17-98

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 155.

THE GREEN BAY AND MINNESOTA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNION STEAMBOAT COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 29, 1879.

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INDEX.

	Original.	Print.
Writ of error	1	1
Præcipe	1a	2
Bond for costs	2	2
Summons	3	3
Return to summons	4	3
Complaint	5	4
Answer	14	8
Reply	19	11
Hearing and judgment	22	13
Motion for new trial	23	13
Continuance	23	13
Order denying motion	24	14
Motion for new trial	24	14
Order denying same	25	14
Bill of exceptions	25	15
Contract between The Union Steamboat Company and The Green Bay and Minnesota Railroad Company	26	15
Resolutions of board of directors	41	22
Charge to jury	42	22
Bill of exceptions signed	45	24
Bond on appeal	46	24
Assignment of errors	48	25
Citation	50	26
Certificate of clerk	51	26

1*b* UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a term of the circuit court of the United States for the western district of Wisconsin, begun and held according to law, at the city of Madison, in said district, on the first Monday (being the 3rd day) of June, A. D. 1878. Present and presiding, the honorable Romanzo Bunn, judge.

On the ninth day of said term, to wit, on the 12th day of June, A. D. 1878, the following among other proceedings were had, to wit:

THE UNION STEAMBOAT COMPANY, PLAINTIFF,
vs.
THE GREEN BAY AND MINNESOTA RAILROAD COMPANY, defendant. } At law.

Be it remembered that heretofore, to wit, on the 24th day of January, A. D. 1878, came the above-named plaintiff, by Smith and Lamb, its attorneys, and filed its præcipe for a summons in an action on money demand, in the words and figures following, viz:

Præcipe.

United States circuit court, western district of Wisconsin.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Wisconsin, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court, before you, between The Union Steamboat Company and The Green Bay and Minnesota Railroad Company, a manifest error hath intervened, to the great damage of the said Green Bay and Minnesota Railroad Company, as by its complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, in the District of Columbia, on the second Tuesday (being the 14th day) of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Su-

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Witness the honorable Morrison R. Waite, Chief Justice of the Su-

preme Court of the United States, the *twenty* 31st day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] F. M. STEWART,
Clerk of the Circuit Court of the U. S.,
Western District of Wisconsin.

E. C. AND W. C. LARNED,
Att'ys for Pl'ff in Error.

Allowed by me.

R. BUNN, *Judge.*

1*a* The return to the within writ appears by the schedule hereto annexed.

The return of the judge of the circuit court of the United States for the western district of Wisconsin.

In testimony whereof I have hereunto set my hand and duly affixed the seal of said circuit court at my office, in the city of Madison, this 31st day of October, A. D. 1879, and of our Independence the one hundred & fourth year.

[SEAL.] F. M. STEWART,
Clerk said Court.

(Indorsed:) Supreme Court United States. The Union Steamboat Company, pl'ff in error, vs. The Green Bay and Minnesota Railroad Company, def't in error. Writ of error.

2 THE UNION STEAMBOAT COMPANY, PL'FF,
vs.
THE GREEN BAY AND MINNESOTA RAILROAD Company, def't.

Demand judgment for $7,398.30, with interest thereon at the rate of 7 per cent. from the first day of January, A. D. 1876, and also the further sum of $86,970.94, with interest from this day, 24th January, 1878.

F. M. STEWART, *Clerk:*

SIR: Issue summons in above entitled action, according to above directions.

Yours, &c.,

SMITH AND LAMB,
Plaintiff's Attorneys.

24 JANUARY, 1878.

And at the same time, to wit, January 24, 1878, said plaintiff filed its bond for costs, as follows, viz.:

Bond for costs.

Know all men by these presents that we, George B. Smith and F. J. Lamb, are held and firmly bound unto the Green Bay and Minnesota Railroad Company in the sum of two hundred dollars, to be paid to the said Green Bay and Minnesota Railroad Company, of the State of Wiscon-

sin, it successors or assigns, to which payment well and truly to be made and done, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals the 24th day of January, A. D. 1878.

3 Whereas an action of is about to be commenced at the suit of The Union Steamboat Company, of the State of New York, a corporation existing under and by virtue of the State of New York:

Now, therefore, the condition of this obligation is such that if the plaintiff will pay all costs that may be awarded against him, not exceeding the aforesaid sum, then this obligation to be void, else valid.

GEORGE B. SMITH. [SEAL.]
F. J. LAMB. [SEAL.]

Witness:
MARTIN ESSER.

Whereupon, on said 24th day of January, A. D. 1878, a summons issued, returnable within twenty days after the service thereof, in the words and figures following, to wit:

Summons.

Circuit court of the United States for the western district of Wisconsin.

THE UNION STEAMBOAT COMPANY, PLAINTIFF, *vs.* THE GREEN BAY AND MINNESOTA RAILROAD Company, defendant. } Summons for money demand.

The United States of America to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in this action, which will be filed in the office of the clerk of this court at Madison, in said district. And you are also required to

4 file your answer thereto with the clerk of this court at Madison, and to serve a copy thereof on the attorneys of the plaintiff, whose names are subscribed hereto, at their office, in the city of Madison, Wis., within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of seven thousand three hundred ninety-eight dollars and thirty cents, with interest thereon at the rate of 7 per cent. per annum from the 1st day of January, in the year one thousand eight hundred and seventy-six, also the further sum of $86,970.94, with interest from the 24th day of January, 1878, besides the costs of this action.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, in the said western district of Wisconsin, this 24th day of January, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and second.

[SEAL.] F. M. STEWART, *Clerk.*

SMITH AND LAMB,
Plaintiff's Attorneys.

On which said summons appears the following return, to wit:

Return.

Served on the within named The Green Bay and Minnesota Railroad Company, by delivering to W. E. Peck, a director of said company, personally, a copy of this summons, this 16th day of January, A. D. 1878. Fees, $13.34.

F. W. OAKLEY, *Marshal*,
By H. CRAMER, *Deputy*.

5 Served on the within named The Green Bay and Minnesota Railroad Company, by delivering to D. M. Kelley, a director of said railroad company, personally, a copy of this summons, this 24th day of January, 1878.

F. W. OAKLEY, *U. S. M.*,
By W. S. MAIN, *Dep'y*.

And afterwards, to wit, on the 19th day of March, A. D. 1878, came said plaintiff and filed its complaint herein, as follows, to wit:

Complaint.

Circuit court of the United States for the western district of Wisconsin.

THE UNION STEAMBOAT COMPANY, PLAINTIFF,
vs.
THE GREEN BAY AND MINNESOTA RAILROAD COMPANY, DEFENDANT.

The plaintiff complains against the defendant, and shows to this court, upon information and belief:

1st. That the plaintiff, The Union Steamboat Company, is a citizen of the State of New York, duly incorporated by the name aforesaid by the said State of New York, and has its principal place of business therein.

2d. That the defendant, The Green Bay and Minnesota Railway Company, is a citizen of the State of Wisconsin, duly incorporated by the name of The Green Bay and Lake Pepin Railway Company by said State
6 of Wisconsin, and whose said name was afterwards and before the commencement of this action duly changed and altered to The Green Bay and Minnesota Railroad Company, and according to law, and it has its principal place of business in said State of Wisconsin.

3d. That as such corporations the parties hereto were duly authorized and empowered by their respective charters and the laws of Wisconsin to enter into and make the contracts, agreements, stipulations, and obligations herein mentioned and described.

4th. That on the 24th day of January, A. D. 1878, the defendant was justly indebted to the plaintiff on seven certain promissory notes in the principal sum of seven thousand three hundred and ninety-eight dollars and thirty cents ($7,398.30), besides interest, as hereinafter stated.

5th. That on the 1st day of May, A. D. 1876, at Green Bay, Wisconsin, the defendant, being such corporation, by its agents duly authorized

thereto, made to one W. Bullard, gen'l manager, in the course of the legitimate business of the said defendant, as by law it had power to do, its promissory note, in writing, dated on that day, and thereby promised to pay to the order of said W. Bullard, gen'l manager, one thousand and fifty-six and $\frac{90}{100}$ dollars, on the 20th January, after said date, for value received; that thereupon the said W. Bullard, gen'l manager, payee thereof, duly endorsed the same to this plaintiff; that no part thereof has been paid, but the same, with interest since 20' January, 1877, is justly due this plaintiff.

6th. That on the 1st day of May, A. D. 1876, at Green Bay, Wisconsin, the defendant being such corporation, by its agents duly authorized thereto, made to one W. Bullard, gen'l manager, in the course of
7 the legitimate business of said defendant, as by law it had power to do, its promissory note, in writing, dated on that day and thereby promised to pay to the order of said W. Bullard, gen'l manager, one thousand and fifty-six & $\frac{90}{100}$ dollars, on the 5th February after said date, for value received; that thereupon the said W. Bullard, gen'l manager, payee thereof, duly endorsed the same to this plaintiff; that no part thereof has been paid, but the same, with interest since 5th February, 1877, is justly due this plaintiff.

7th. That on the 1st day of May, A. D. 1876, at Green Bay, Wisconsin, the defendant, being such corporation, by its agents duly authorized thereto, made to one W. Bullard, gen'l manager, in the course of the legitimate business of said defendant, as by law it had power to do, its promissory note, in writing, dated on that day, and thereby promised to pay to the order of said W. Bullard gen'l manager, one thousand and fifty-six & $\frac{90}{100}$ dollars, on the 20th February, after said date, for value received; that thereupon the said W. Bullard, gen'l manager, payee thereof, duly endorsed the same to this plaintiff; that no part thereof has been paid, but the same, with interest since 20th February, 1877, is justly due this plaintiff.

8th. That on the first day of May, A. D. 1876, at Green Bay, Wisconsin, the defendant being such corporation, by its agents duly authorized thereto, made to one W. Bullard, gen'l manager, it the course of the legitimate business of said defendant, as by law it had power to do, its promissory note, in writing, dated on that day, and thereby promised to pay to the order of said W. Bullard, gen'l manager, one thousand and fifty-six & $\frac{90}{100}$ dollars, on the 5th March after said date, for value received; that
8 thereupon the said W. Bullard, gen'l manager, the payee thereof, endorsed the same to this plaintiff; that no part thereof has been paid, but the same, with interest since 5th March, 1877, is justly due this plaintiff.

9th. That on the first day of May, A. D. 1876, at Green Bay, Wisconsin, the defendant, being such corporation, by its agents duly authorized thereto, made to one W. Bullard, gen'l manager, in the course of the legitimate business of said defendant, as by law it had power to do, its promissory note, in writing, dated on that day, and thereby promised to pay to the order of said W. Bullard, gen'l manager, one thousand and fifty-six & $\frac{90}{100}$ dollars on the 20th March after said date, for value received; that thereupon the said W. Bullard, gen'l manager, the payee thereof, duly endorsed the same to this plaintiff; that no part thereof has been paid, but the same, with interest since 20th March, 1877, is justly due this plaintiff.

10th. That on the first day of May, A. D. 1876, at Green Bay, Wisconsin, the defendant, being such corporation, by its agents duly authorized thereto, made to one W. Bullard, gen'l manager, in the course of the legitimate business of said defendant, as by law it had power to do, its promissory note, in writing, dated on that day, and thereby promised to pay to the order of said W. Bullard, gen'l manager, one thousand and fifty-six & $\frac{90}{100}$ dollars, on the 5th April after said date, for value received; that thereupon the said W. Bullard, gen'l manager, payee thereof, duly endorsed the same to this plaintiff; that no part thereof has been paid, but the same, with interest since 5th April, 1877, is justly due to this plaintiff.

11th. That on the first day of May, A. D. 1876, at Green Bay,
9 Wisconsin, the defendant, being such corporation, by its agents duly authorized thereto, made to one W. Bullard, gen'l manager, in the course of the legitimate business of the said defendant, as by law it had power to do, its promissory note, in writing, dated on that day, and thereby promised to pay to the order of said W. Bullard, gen'l manager, one thousand and fifty-six & $\frac{90}{100}$ dollars, on the 20th April after said date, for value received; that thereupon the said W. Bullard, gen'l manager, payee thereof, duly endorsed the same to this plaintiff; that no part thereof has been paid, but the same, with interest since 20th of April, 1877, is justly due this plaintiff.

12th. And for a further and separate cause of action the plaintiff shows to this court that the defendant railway company was chartered in the year 1866, and was organized to construct and operate a railroad across the State of Wisconsin, east and west from the city of Green Bay to the Mississippi River, and it was built and actually opened for business in December, 1873. And it became important for said defendant to make arrangements in regard to the business of carrying passengers and freight carried eastwardly over its road, and destined for points east of said city of Green Bay and out of the State, for their transportation east, as well as to secure business of carrying passengers and freight arriving at or being moved west by way of defendant's route and railway; and thereupon, on the 9th day of September, 1873, at Green Bay aforesaid, the plaintiff and defendant duly entered into a contract in writing, and duly sealed by the corporate seals of the respective parties, whereby, in consideration that the plaintiff's would for the seasons of 1876 and 1877, commencing at the opening of navigation in each year, and continuing during the sea-
10 sons of navigation in each year, but not later than noon of the 30th of November in any year, run between the port of Buffalo, in the State of New York and said city of Green Bay, Wisconsin, by the way of the great lakes, touching at the intermediate ports of Cleveland, Detroit, Port Huron, and Mackinac, two steam propellers, the Passaic and Canister, then belonging to the plaintiff, for the purpose of carrying passengers and freight to and from said city of Green Bay, the eastern terminus of said defendant's said railway, in connection with said defendant's railway and business and docks at Green Bay. The defendant duly undertook and guaranteed to the plaintiff that the gross earnings of each of said two propellers in such business should be for each of said years at least the sum of forty-five thousand dollars, and that in case the gross earnings of each of said propellers above named, should not, in each year, 1876 and 1877, amount to the said sum of $45,000, being the sum of

$180,000 in all, that it, the said defendant, would pay to the plaintiff such deficiency on or before the first day of January next succeeding the close of the navigation in each and every year last above mentioned.

And the plaintiff further shows to this court that it duly put said steam propellers Passaic and Canister on said route, and kept the same running on said route in connection with the business of said defendant and in accordance with said contract during each of said seasons of 1876 and 1877, and the said plaintiff duly, in all respects, performed all of the conditions of said contract on its part to be performed.

And the plaintiff further shows that during the year 1876 the entire gross earnings of said propeller Passaic were only the sum of
11 twenty thousand one hundred and fifty-six & $\frac{51}{100}$ dollars, and fell short of the gross earnings so as aforesaid guaranteed to this plaintiff by defendant under and by said contract for said propeller for said year 1876 in the sum of twenty-four thousand eight hundred and forty-three & $\frac{49}{100}$ dollars, which last-named sum thereupon became due and payable to this plaintiff from the defendant under said contract on the 1st day of January, A. D. 1877.

And the plaintiff further shows that during the year 1876 the entire gross earnings of said propeller Canister were only the sum of the twenty-four thousand eight hundred and thirty-nine & $\frac{82}{100}$ dollars, and fell short of the gross earnings so as aforesaid guaranteed to this plaintiff by said defendant under and by said contract for said propeller for said year 1876 in the sum of twenty thousand one hundred and sixty & $\frac{18}{100}$ dollars, which last-named sum thereupon became due and payable to this plaintiff from the defendant under said contract on the first day of January, A. D. 1877.

And the plaintiff further shows that during the year 1877 the entire gross earnings of said propeller Passaic were only the sum of seventeen thousand and nineteen & $\frac{64}{100}$ dollars; that during said year 1877 the plaintiff ran on said route in connection with the business of the defendant aforesaid the steam propeller of the plaintiff, Toledo, three trips, the gross earnings of which were the sum of six thousand seven hundred and eighty-six & $\frac{36}{100}$ dollars, which gross earnings added to said gross earnings of said propeller Passaic amounts only to the sum of twenty-three thousand eight hundred and six dollars, and fell short of the gross
12 earnings so as aforesaid guaranteed to this plaintiff by said defendant under and by said contract for said propeller Passaic for said year 1877 in the sum of twenty-one thousand one hundred and ninety-four dollars, which last-named sum became due and payable to this plaintiff from the defendant under said contract on the first day of January, A. D. 1878.

And the plaintiff further shows that during the year 1877 the entire gross earnings of said propeller Canister were only the sum of twenty-four thousand two hundred and twenty-six & $\frac{73}{100}$ dollars, and fell short of the gross earnings so as aforesaid guaranteed to this plaintiff by said defendant under and by said contract for said propeller for said year 1877 in the sum of twenty-thousand seven hundred seventy-three & $\frac{27}{100}$ dollars, which last-named sum became due and payable to this plaintiff from the defendant under said contract on the first day of January, A. D. 1878.

And the plaintiff further shows to this court that before the commence-

ment of this action the plaintiff duly demanded payment from said defendant of the said several sums herein alleged to be due on said notes and under said contract, together with lawful interest on said several sums after they severally became due as aforesaid, but the same have not nor have any part of any thereof been paid.

Wherefore the plaintiff demands judgment against the defendant for the principal sum of $7,393.30 due on said notes, with interest at seven per cent. per annum on $1,056.90 since 20 January, A. D. 1877; and on $1,056.90 since 5 February, 1877; and on $1,056.90 since 20 February, 1877; and on $1,056.90 since 5 March, 1877; and on $1,056.90
13 since 20 March, 1877; and on $1,056.90 since 5 April, 1877; and on $1,056.90 since 20th April, 1877, and on the principal sum of $86,970.94, due as aforesaid on said contract, with interest at seven per cent. per annum on the sum of $45,003.67 since the first day of January, A. D. 1877, and on the remaining sum of $41,957.27 since the first day of January, A. D. 1878, besides the costs of this action, and for such further or different judgments or relief as may be just in the premises.

SMITH AND LAMB,
Plaintiff's Attorneys.

STATE OF WISCONSIN,
Dane County, ss:

F. J. Lamb, being duly sworn, says he is one of the attorneys for the plaintiff herein; that the plaintiff is a corporation incorporated in the State of New York and doing business there, and its place of business is not in Wisconsin, and it has no agent or officer in the State, as deponent is informed and believes, by whom this affidavit of verification could be made aside from said attorneys; deponent further says he has read the foregoing complaint and knows the contents thereof, and the same are true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says that his knowledge is derived from the possession, as such attorney, of the notes described in said complaint and from information furnished him by said plaintiff's officers and agents, which deponent believes to be true. That the foregoing are the reasons why this verification is not made by the plaintiff and the grounds of deponent's information and belief.

F. J. LAMB.

Subscribed and sworn to before me this 19th day of March, 1878.
F. M. STEWART, *Clerk.*

14 On which said complaint appears the following endorsement, to wit:

Service of the within complaint admitted this 25th day of March, A. D. 1878.

LARNED, RYERSON & LARNED,
Def't's Att's.
By COTTRILL AND CARY.

And afterwards, to wit, on the 23d day of April, A. D. 1878, came the said defendant, by its attorneys, Larned, Ryerson and Larned, and filed its answer herein as follows, to wit:

Answer.

Circuit court of the United States for the western district of Wisconsin.

THE UNION STEAMBOAT COMPANY, PLAINTIFF,
vs.
THE GREEN BAY AND MINNESOTA RAILROAD COMPANY, defendant.

The defendant answers to the complaint:

First. That as to the first article of plaintiff's complaint, it has no knowledge or information sufficient to form a belief as to the truth of the same.

Second. That as to the second article of said complaint, the defendant admits the facts therein stated to be true.

Third. That as to the third article of said complaint, the defendant denies that it was empowered as stated therein, but has no information or knowledge sufficient to form a belief as to whether the plaintiff was empowered as therein stated.

Fourth. That as to the fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh articles of said complaint, defendant has no information or knowledge sufficient to form a belief as to the truth of the same.

Fifth. As to the twelfth article of said complaint and the separate claim contained, the defendant answers as follows:

It admits that on the ninth day of September, eighteen hundred and seventy-three, a contract, purporting to be made by this defendant, was made with The Union Steamboat Company, to guarantee to said Union Steamboat Company for the seasons of navigation of and during the years A. D. eighteen hundred and seventy-three, eighteen hundred and seventy-four, eighteen hundred and seventy-five, eighteen hundred and seventy-six, and eighteen hundred and seventy-seven, beginning at the opening of navigation and continuing to the close, but not later than the 30th of November, at noon, in each year; that the respective earning in gross of the two steam propellers, the Passaic and Canister, should not be less than the sum of forty-five thousand dollars each for each season of navigation in said years, as aforesaid, upon condition that said Union Steamboat Company would run said steam propellers, or their equivalent in freight capacity and insurance rating, between the ports of Buffalo, New York, and Green Bay, Wisconsin, touching at the intermediate ports of Cleveland, Detroit, Port Huron, and Makinac during said seasons of navigation, as aforesaid.

And the said Union Steamboat Company further agreed by said alleged contract that said propellers, running as aforesaid, should receive as fair and large divisions and rates on freights delivered to and received from connecting railroads and steamboat lines as any other propellers owned by them carrying like freight and running in the Chicago and Milwaukee trade; and said Union Steamboat Company agreed to render full accounts of the earnings of said propellers to defendants, and to allow them access to all their books and papers of said account; and said steamboat company further agreed to give defendant all freights and passengers which it or the Erie Railroad Company could control during the continuance of said contract, and to make the lowest rates upon the same which

it made to any one, and said rates not to exceed the rates to Chicago and Milwaukee on like freight, all of which will appear in and by said contract, to which defendant hereby refers, and which it will produce hereafter.

And defendant further shows that it continued under said alleged contract and in the performance of the same during the years eighteen seventy-three and eighteen seventy-four; but that on the 2nd day of April, 1875, by another agreement in writing with said Union Steamboat Company, the amount of said guarantee aforesaid was reduced from forty-five thousand to thirty-five thousand dollars upon the gross earnings of each of said propellers during the season of navigation of eighteen hundred and seventy-five, and the defendant shows that it acted in pursuance of said alleged contract as to the season of eighteen hundred and seventy-five, and as to the guarantee of thirty-five thousand dollars under the same.

And the defendant further shows, upon information and belief, that the amount of said alleged guarantees for the years eighteen
17 hundred and seventy-six and eighteen hundred and seventy-seven was, by agreement between the said parties thereto, reduced to the sum of twenty-five thousand dollars upon each of said propellers for each of said years.

Therefore, defendant shows that under said alleged contract the amounts due upon said alleged guarantee from defendant to plaintiff, if any there be due, are as follows:

In the year eighteen hundred and seventy-six, on propeller Passaic, four thousand eight hundred and forty-three dollars and forty-nine cents; on propeller Canister, one hundred and sixty dollars eighteen cents. For the year eighteen hundred seventy-seven, on propellers Passaic and Toledo, eleven hundred and ninety-four dollars on propeller Canister, seven hundred and seventy-three dollars and eighty-seven cents, the same being the difference between the gross earnings of said propellers for said years as stated in said complaint and the amount of said guarantee as reduced by agreement for said years, and that which said sums, aggregating five thousand nine hundred and seventy-one dollars and fifty-four cents, without interest, are the only amounts due, if any, under said alleged contract to said plaintiff from said defendant.

Fifth. And defendant for a counter claim shows further that plaintiff failed to comply with the terms of said alleged agreement in respect to—

First. Making as low rates on said propellers as on any other boats belonging to them in said Milwaukee and Chicago trade carrying similar freight.

Second. Making proper reports of the earnings of said propellers
18 to defendant, and allowing defendant access to their books and papers of said account.

Third. Controlling in favor of defendant all the freight and passenger business within the control of said plaintiff or the Erie Railway Company.

Fourth. Running said propellers during the time agreed.

Defendant shows that the plaintiff failed to run said steamers as they agreed, but fell short and lost on each of said propellers during each of the years eighteen seventy-three, eighteen hundred and seventy-four, and eighteen hundred and seventy-five, one trip, and that the gross earnings of each boat, on each trip, being the sum, on an average, of fifteen hun-

dred dollars, there was thereby lost out of the gross earnings of each propeller through the breach of contract of plaintiff the sum of three thousand per annum, or for the years eighteen hundred and seventy-three-eighteen hundred and seventy-four, and eighteen hundred and seventy-five, the sum of nine thousand dollars, which sum is due to defendant from plaintiff, and should be applied in reduction of the balance claimed to be due from defendants to plaintiff, leaving nothing due upon said alleged contract, but on the contrary the sum of three thousand and twenty-eight dollars and forty-six cents due from plaintiff to the defendant.

Wherefore defendant demands judgment for three thousand and twenty-eight dollars and forty-six cents.

LARNED, RYERSON, AND LARNED,
D'f'd't's Att'ys.

19 Circuit court of the United States, eastern district of Wisconsin.

STATE OF WISCONSIN,
County of Brown, ss:

Timothy Case, being duly sworn, says that he has read the annexed answer of the Green Bay and Minnesota Railroad Company, and knows the facts therein stated to be true, except as to those facts therein stated upon information and belief, and as to those facts he believes them to be true.

TIMOTHY CASE.

Subscribed and sworn to before me this 20th day of April, 1878.
[SEAL.] H. J. HUNTINGTON,
Notary Public, Wis.

And afterwards, to wit, on the 30th day of April, A. D. 1879, came the said plaintiff, by its attorneys, and filed its reply herein, as follows, viz:

Reply.

Circuit court of the United States for the western district of Wisconsin.

THE UNION STEAMBOAT COMPANY, PLAINTIFF,
vs.
THE GREEN BAY AND MINNESOTA RAILROAD COMPANY, defendant.

The plaintiff, for reply to so much of defendant's answer as alleges a counter claim, on information and belief says it denies the same,
20 and each and every allegation thereof not admitted by the complaint, excepting, also, that as to the allegation of said counter claim as to failure to make trips by said steamers in 1873, 1874, and 1875, plaintiff says the trips of said steamers during those years were made to the satisfaction and acceptance of the defendant, and after the business for those years under said contract had been performed and concluded and settled, and on the first day of May, A. D. 1876, the parties had an accounting and settlement for those years, under said contract, and the promissory notes,

set forth and described in plaintiff's complaint herein as grounds of action against the defendant, were made and delivered as in said complaint alleged, and they were so made by the defendant on settlement between the parties hereto, and said notes, with a number of others, were so made at said time to secure plaintiff the amounts then due this plaintiff from defendant under their said contract, for time previous to 1st January, 1876, on such settlement; and the other of said notes of said series defendants paid before the commencement of this action.

Wherefore plaintiff prays judgment against the defendant as in its complaint.

SMITH AND LAMB,
Plaintiff's Attorneys.

WESTERN DISTRICT OF WISCONSIN,
State of Wisconsin, Dane County, ss:

F. J. Lamb, being duly sworn, says he is one of the attorneys of the plaintiff herein; that the plaintiff is a corporation incorporated in the State of New York and doing business there, and its place of
21 business is not in Wisconsin, and it has no agent or officer in this State, as deponent is informed and believes, by whom this affidavit of verification could be made aside from said attorneys. Deponent further says he has read the foregoing reply and knows the contents thereof, and the same are true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says that his knowledge is derived from the possession as such attorney of the contract and notes described in said reply, and from information furnished him by said plaintiffs' officers and agents, which deponent believes to be true; that the foregoing are the reasons why this verification is not made by the plaintiff and the grounds of deponent's information and belief.

F. J. LAMB.

Subscribed and sworn to before me this 30th day of April, 1878.
F. M. STEWART, *Clerk.*

STATE OF WISCONSIN,
Dane County, ss:

Martin Esser, being duly sworn, says he is clerk in the law office of Smith and Lamb, the attorney for the plaintiff herein; that on the 30th day of April, A. D. 1878, he served the within reply on Larned, Ryerson and Larned, the attorneys for the defendant herein, by depositing a copy thereof in the post-office, at Madison, Wisconsin, properly enclosed in an envelope and directed to said Larned, Ryerson and Larned, at Chicago, Ills., their place of business and residence, and by prepaying the postage thereon.

MARTIN ESSER.

22 Subscribed and sworn to before me this 30th day of April, 1878.
[SEAL.] F. J. LAMB,
Notary Public, Dane Co. Wis.

And on this day, to wit, the said 12th day of June, A. D. 1878, in the record of the proceedings aforesaid in said entitled cause there appears the following entry, to wit:

Hearing and judgment.

THE UNION STEAMBOAT COMPANY
vs.
THE GREEN BAY AND MINNESOTA RAILroad Company.

This day came the parties, by their counsel, and this cause came on to be tried. Whereupon a jury is ordered to come, who came, to wit: S. P. Berry, Zenos Beach, R. E. Davis, James R. Stuart, A. Henderson, A. L. Lund, E. H. Hughes, A. H. Smith, J. Donaghey, Andrew Sexton, W. P. Frost, E. W. Dwight, twelve honest and lawful men of the district, duly empanneled, tried, sworn, and charged. And the jurors of the jury aforesaid, upon their oaths, do say that they find the issue herein in favor of the plaintiff, and assess its damages at the sum of seventy-eight thousand eight hundred seventy-six dollars and thirteen cents. Whereupon it is considered and adjudged that said plaintiff do have and recover of said defendant, the Green Bay and Minnesota Railroad Company, the said sum of seventy-eight thousand eight hundred and seventy-six dollars and thirteen cents, with fifty-nine dollars and twenty-four cents, its costs
23 about its said suit in this behalf expended, and that it have execution therefor.

And afterwards, in the said June term, A. D. 1878, of said court, and on the 26th day thereof, to wit, on the 16th day of July, A. D. 1879, before the Hon. Romanzo Bunn, judge, in the record of the proceedings aforesaid appears the following entry, to wit:

Motion for a new trial.

THE UNION STEAMBOAT COMPANY
vs.
THE GREEN BAY AND MINNESOTA RAILroad Company.

This day came the parties by their attorneys, and the motion for a new trial is argued and submitted.

And thereafter, on the 38th day of said term, being the 14th day of September, A. D. 1878, in the record of the proceedings aforesaid, appears the following entry, viz:

Continuance.

THE UNION STEAMBOAT COMPANY
vs.
THE GREEN BAY & MINNESOTA RAILROAD Company.

This day came the parties by their attorneys, and on motion, it is or-

dered that the motion for a new trial be, and the same hereby is, continued till next term.

And afterwards, on the eighth day of the September term of said court, to wit, on the 8th day of November, A. D. 1878, before the Hon.
24 R. Bunn, judge, in the record of the proceeding, aforesaid in said entitled cause appears the following entry, viz:

Order denying motion.

THE UNION STEAMBOAT COMPANY
vs.
THE GREEN BAY AND MINNESOTA RAILroad Company.

This cause, having been tried by jury at the June term of this court, 1878, and the jury having found a verdict for the plaintiff, and, at the same term, the defendant, by its counsel, moved the court to set aside the verdict and grant a new trial therein, and the court having reserved its decision, now, on this day, it is hereby ordered that said motion be, and the same is overruled; and it is further ordered that defendant's counsel have leave to renew this motion before Judge Drummond at the December term next, at Madison.

And afterwards, to wit, at the December term of said court, 1878, and on the 31st day thereof, viz, on the 15th day of February, A. D. 1879, before the Hon. Thomas Drummond and the Hon. Romanzo Bunn, in the record of the proceedings aforesaid in said entitled cause appears the following entry, to wit:

Motion for a new trial.

UNION STEAMBOAT COMPANY
vs.
GREEN BAY AND MINNESOTA RAILROAD Company.

25 This day came the parties by their attorneys, and the motion to set aside the verdict herein and for a new trial is argued and submitted.

And thereafter, at the said December term, 1878, on the 36th day of said term, being the 20th day of February, A. D. 1879, before the Hon. Thomas Drummond and the Hon. Romanzo Bunn, in the record of proceedings aforesaid is the following entry, to wit:

Order denying motion for new trial.

THE UNION STEAMBOAT COMPANY
vs.
THE GREEN BAY AND MINNESOTA RAILroad Company.

This day came the parties by their attorneys, and the motion for a new

trial, &c., having been argued and submitted, on consideration it is ordered that said motion be, and the same is hereby, denied.

On the trial of said cause the following exceptions were taken, and have been signed on the 26th day of August, A. D. 1879, and are in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for the western district of Wisconsin. June term, 1878.

THE UNION STEAMBOAT COMPANY
vs.
THE GREEN BAY & MINNESOTA RAILROAD COMPANY. } Assumpsit.

26 Be it remembered that heretofore, on the trial of the above entitled cause, before the Hon. Romanzo Bunn, one of the judges of said court, and a jury, the plaintiff, to maintain the issues on its part, offered the charter of the Union Steamboat Company, being an act of the legislature of the State of New York passed April 15, 1874.

Also, the charter of the Green Bay and Minnesota Railroad Company, being an act of the legislature of the State of Wisconsin, approved April 12th, 1866, and the several acts amendatory thereof.

Also, that the said defendant railroad extended from the Mississippi River to the city of Green Bay, situated at the head of said Green Bay, a part of Lake Michigan.

The plaintiff then offered in evidence a certain contract in writing, dated the 9th day of September, A. D. 1873, between the said Union Steamboat Company and the said Green Bay and Minnesota Railroad Company, which said contract was as follows:

This agreement made this 9th day of September, 1873, between the Union Steamboat Company, a corporation existing under and by virtue of the laws of the State of New York, party of the first part, and the Green Bay and Lake Pepin Railway Company, a corporation existing under and by virtue of the laws of the State of Wisconsin, party of the second part, witnesseth:

That whereas the party of the first part own, control, and operate a line of steam propellers in the freight and passenger business on the great lakes and the party of the second part owns, operates, and controls a railroad now extending from the city of Green Bay, Wis., and which rail-
27 road is to be shortly extended to the city of Winona, Minnesota, there connecting with other railway lines, and with steamboats on the Mississippi River, from all of which it expects to receive freight, and it appearing to be the mutual interest and advantage of the parties hereto that an agreement should be entered into for a business connection and for an interchange of business in accordance with the conditions herein expressed: Now, therefore, for and in consideration of the premises, and of the covenants and agreements hereinafter contained, and the sum of one

dollar paid by each of said parties to the other, the receipt whereof is hereby acknowledged, it is covenanted and agreed by and between the parties hereto as follows:

First. That the party of the first part will run between the port of Buffalo, State of New York, and the port of Green Bay, State of Wisconsin, touching at the intermediate ports of Cleveland, Detroit, Port Huron, and Mackinac, two propellers, which shall be the Passaic and the Canistee, now owned by the party of the first part, and now running between the above named ports, or other propellers which shall be equal in every respect as to freight capacity, and insurance standard as the propellers named, and will run them between said ports in the season of navigation, during the existence of this agreement; and the party of the first part further agrees that said steamers shall, during the said time of this agreement, be kept up to their present insurance standard and present condition for transporting freight and passengers: and in case either or both of the steamers named are disabled or lost, such steamer or steamers shall be at once replaced by the party of the first part by a steamer or steamers which
28 shall be equal in every respect, as to freight and passenger capacity, as the steamer or steamers disabled or lost; provided that, if either or both of said steamers are replaced by another steamer or steamers, that the steamer or steamers taking the place of either or both of said steamers shall not rate lower than A 2.

And the party of the second part, for and in consideration of such running of such two steamers between the said ports aforesaid, will, and hereby does, guarantee to each of said propellers gross earnings to the amount of forty-five thousand dollars ($45,000) during the season of navigation, which season of navigation shall be understood to mean from the opening thereof until November 30th, at noon, of each year, it being clearly understood and agreed that any and all excess of earnings over the sum guaranteed to either or both of said boats shall belong entirely to the party of the first part.

Second. And it is understood and agreed by and between the parties hereto, that the party of the first part undertakes and agrees that the propellers running in the trade between the ports of Buffalo and Green Bay, under and in fulfilment of this contract, shall receive as fair and large divisions and rates on freight delivered to and received from connecting railroads and steamboat lines as any other propellers owned by the party of the first part, and running in the Chicago and Milwaukee trade, and carrying like articles of freight, shall receive from any such railroad and steamboat lines, it being clearly understood, however, that the said
29 party of the first part does not now make or control its proportion of the through rates of the connecting lines already covered by contracts.

Third. The party of the second part agrees that its rates, or its proportions of through rates, between common points and Green Bay, in both directions, shall always be as low as rates on like articles on the same dates between the same points and Chicago or Milwaukee, locally, or in connection with steamboat lines on the lakes.

Fourth. The party of the second part undertakes and agrees with the party of the first part, that during the continuance of this contract the agency of the party of the first part at Green Bay shall be maintained

without expense to the party of the first part, and that ample dock room any warehouse and elevator facilities shall be provided at said port of Green Bay for the business which may be done at that port under and by reason of this contract, without expense to the party of the first part, it being understood that the usual charge on grain made at the ports of Milwaukee and Chicago may be made on all grain handled at Green Bay under and by reason of the provisions of this contract.

The said party of the second part also agrees that the said party of the first part shall have the right to use, for the purpose of loading, unloading
30 and discharging the cargoes of its propellers, and for any business contemplated to be done by the said or its additional or other propellers, any and all docks, piers, and wharves the said party of the second part may own, control, or have lease of at the time, at any of said ports and places, and to use the same free of expenses and in preference over any other party or parties desiring to use the same.

Fifth. It is understood and agreed by and between the parties hereto that to the extent of the transportation facilities supplied by the party of the first part between the ports of Buffalo and Green Bay and intermediate ports, the party of the second part will give to the party of the first part all freight and passengers which it can control, either upon or via its own present rail or water lines, or any which it may hereafter control by purchase, lease, contract, or traffic agreements, going east by water from Green Bay and way ports and going west from Buffalo and way ports, via Green Bay or any other lake termini that said parties of the first part may establish, and that the first offer of all such freight and passengers so controlled or influenced by the party of the second part shall be made to the party of the first part, and that the said party of the second part is not now, nor will it hereafter become, a party to any contracts inconsistent with its obligations to the parties of the first part under this arrangement; nor will it buy, accept, or hold any direct or indirect interests in any boat or boats running to or from Green Bay in competition with the in-
31 terests of the party of the first part while or when the party of the first part furnishes the requisite facilities.

Sixth. The party of the first part shall have the right to put on the line, at such times as it sees fit, as many and such propellers to do such business so offered as it may deem best and proper in addition to the two propellers expressly provided for in and by this contract. If, however, the party of the first part shall, within reasonable time after written or telegraphic demands for facilities actually needed in addition to the two boats hereby agreed to be supplied, neglect or refuse to furnish ample or sufficient facilities for the transportation of all freight and passenger business, which may be so offered by the party of the second part, then the party of the second part shall have the right to provide, temporarily, and only until the party of the first part furnishes the additional transportation facilities required, for the excess of so much of said business as shall not be done by the party of the first part, in such a manner as shall seem to it to be best and for the interests of the parties of the second part.

It is further agreed by and between the parties of this contract that if the boats which may be put on at any time during the existence of this contract are not owned or controlled by any steamboat or railroad line

competing with the Erie Railway or with the party of the first part, that freight and passengers carried on such boats, destined to points
32 reached by said railroad, shall be delivered to said railroad at Buffalo, so far as the party of the second part can influence or control the consignment of such freight and passengers.

Seventh. The said party of the second part agrees, during the continuance of this contract, to furnish and deliver freights, intended for transportation by the propellers aforesaid, at the gang-ways of the said propellers, respectively, at their places of lading, respectively. Each and all the freight, lading, and passengers, the transportation of which, between the ports between which the said propellers shall run, respectivly, shall be eitherdi rectly or indirectly within the control of the party of the second part.

Eighth. The party of the first part agrees that all freight and passengers which it may transport under and by the provisions of this contract between the said ports of Buffalo, Cleveland, Detroit, Port Huron, Mackinac, and Green Bay, and the ports next above named, to Buffalo, shall be taken and transported and delivered at and for the lowest prices and rates that the party of the first part may be charging and receiving on like articles, on the same date, rated between the same points as far as it can control them between the ports of Buffalo, Milwaukee, and Chicago, and intermediate ports going west or going east from Milwaukee and Chicago to Buffalo, and the intermediate ports before mentioned; and, generally, it is understood and agreed by and between the parties of this contract, that, hereafter, during the existence of this contract, neither of the parties to this contract shall or will enter into any contract or agreement inconsistent with the provisions and undertakings of this contract.

33 Ninth. The party of the second part agrees that during the continuance of this contract it will use its influence and best endeavors to have consigned to the Erie Railway at the port of Buffalo all the freight which it can control or influence on its own or other lines of transportation which may come to or leave Green Bay for points east, reached by said railway or propellers, furnished by said party of the first part under this agreement.

Tenth. The party of the first part agrees that, during the continuance of this contract, its agent at Green Bay shall be acceptable to the party of the second part.

Eleventh. It is understood and agreed between the parties hereto that all freight and passengers bound west, to points reached by the road of the party of the second part, shall, to the extent of the transportation facilities furnished by the party of the first part under this contract, be taken to the port of Green Bay, and there delivered to the party of the second part, subject to all the customary exceptions of marine bills of lading and personal risks, upon as reasonable and prompt terms, time, and conditions as it gives any of its lake traffic via other and competing routes.

Twelfth. In the event of the failure of the two aforesaid guaranteed propellers to make in any year, during the continuance of this contract, the gross amount of earnings herein guaranteed by the party of the second part, the party of the second part shall pay to the party of the first
34 part the amount of the deficiency on or before the first day of January next succeeding the close of such season of navigation; and the

party of the first part shall, on or before the thirty-first day of December next succeeding such season, give to the party of the second part a written statement, signed by the general manager, showing the amount of gross earnings of such guaranteed propellers, from all sources for the then previous season of navigation; and the said party of the second part shall have at reasonable and proper times, and through a person acceptable to the party of the first part, access to the proper books and accounts of the party of the first part, for the purpose of verification of such statement.

Thirteenth. It is understood and agreed by and between the parties hereto that this agreement shall be duly approved by the Erie Railway Company, and an endorsement to that effect be duly made by said railway company by its proper officers.

Fourteenth. The said party of the second part also agrees that this contract shall be ratified by resolution of its board of directors, a certified copy of which resolution shall be furnished the party of the first part, and in which said resolution it shall be provided that any deficit in earnings below the guarantee herein made shall be regularly paid according to the conditions contained herein, any considerations of lease, transfer of ownership of the road of the party of the second part, or public policy to the contrary notwithstanding.

35 Fifteenth. It is also agreed by the party of the second part that if, at the expiration of this agreement, the Union Steamboat Company, party of the first part, or its successors, desires to execute a contract for the contract contemplated by this agreement, upon the same, or as favorable terms and conditions as those which may be then offered and guaranteed by any and all other bona fide responsible contracting parties, then the party of the first part shall have and retain the continued preference.

Sixteenth. It is understood and agreed that neither party hereto shall be liable in any way for the loss, damage to, or detention of any property or passengers caused by or occurring while in the possession of the other; and in case of any suit against either, arising on any claim on which the party sued shall claim that the other party is liable, a reasonable notice of such suit shall be given to such other party, and opportunity offered to take part in defense thereof; otherwise such other party shall not be liable to the party sued, but such party shall be liable to the other for any amount it has been compelled to pay by reason of the omission, neglect, or default of such other party.

Seventeenth. Neither party shall have authority to make any contract for the transportation or delivery of freight at or within any particular time; nor shall either party be regarded or held to be authorized under this contract to act for or to be the agent of the other, except for the

36 specific objects and to the extent in this contract provided.

Eighteenth. Nothing herein contained shall be so construed to constitute the parties hereto partners, either as between themselves or as to third persons.

Nineteenth. It is further mutually agreed that in case any question under this agreement shall arise which the said parties hereto cannot decide to their mutual satisfaction, then such question shall be referred to two disinterested experts, one chosen by each party hereto, and, in case such arbiters cannot agree, they shall appoint a third, and a decision by any two of them shall be fixed and binding upon the parties hereto.

Twentieth. This agreement shall take effect and be in force from the opening of navigation of the season, 1873, upon and after its due execution by the parties hereto, through their respective proper officers, and its approval by the said Erie Railway Company, and shall be and remain in force until January 1st, 1878.

In witness whereof the said party of the first part hath caused this instrument to be signed by its president and attested by its secretary, and its corporate seal thereto to be affixed, and the said party of the second part hath caused this instrument to be signed by its president and attested by its secretary, and its corporate seal thereto to be affixed on the day and year first above mentioned.

[SEAL.] THE UNION STEAMBOAT COMPANY,
By W. BULLARD, *Gen'l Manager.*

37 THE GREEN BAY AND LAKE PEPIN R'Y CO.,

[SEAL.] By H. KETCHUM, *President.*

Attest:
FRED. L. ELLIS, *Secretary.*

Nothing in section 4th of the within contract shall be construed as making the party of the first part liable for any charge in elevating or storing grain.

This note is made by the subscriber as expressing the meaning of the parties to the within contract, because, on behalf of the party of the second part, he negotiated the contract with the party of the first part.

D. M. KELLEY,
Sup't G. B. and L. P. R. W. Co.

SEPT. 17TH, 1873.

Approved by the Erie Railway Co.:

G. R. BLANCHARD,
2d Vice-President.

NEW YORK, *Septem.* 19, 1873.

In order to carry into practical business effect the agreement between the Union Steamboat Co. and the Green Bay and Minnesota Railway Co. of date September 9, 1873, the spirit of the aforesaid contract is declared to be:

First. That the rates between Green Bay and common points
38 west thereof, in both directions, are to be the same as the rates between Milwaukee and Chicago and the same points, on like articles on the same dates, moving in the same direction.

Second. Touching lake freight, the understanding is declared to be that the rates between Buffalo, Cleveland, Detroit, Port Huron, and Green Bay, in both directions, shall be the same touching lake freight and conditions as like articles moving in the same direction, upon the same dates, between the same points and Milwaukee or Chicago.

Third. Touching all rail freights moving over the Erie Railway and the Green Bay and Minn. R'way, via the boats of the Union Steamboat Co., the Erie Railway Co. is to make, or authorize to be made, upon like articles, upon the same dates, westward and eastward bound, as low rates

between New York, Boston, and other eastern competing points and the city of Green Bay as it uses to or from the cities of Milwaukee and Chicago, and it will authorize the issue of bills of lading to that effect.

Fourth. The Green Bay and Minn. R. R. Co. will authorize the issue of bills of lading upon this basis to and from Green Bay, as before provided, which rates, classifications, and conditions shall be furnished to the general freight agent of the Erie Railway Co. at least ten days before such change shall go into effect.

Fifth. The Green Bay and Minn. R'way Co. may make, and authorize to be made, any bills of lading, for which it will hold itself responsible, from any point on or via its lines, by adding as low rates to Green Bay as those to Milwaukee and Chicago, as before provided, to as low rates from Green Bay by the Union Steamboat Company for lake freights on the Union Steamboat Company and the Erie Railway Company for joint freight as are given from Milwaukee and Chicago, upon notices to be given by W. Bullard, general manager.

Sixth. All unconsigned freights received by the Erie Railway Co. or Union Steamboat Company destined to points reached by the Green Bay and Minn. R'way Co. and its river and rail connections westward, upon as favorable terms from Green Bay as from Milwaukee or Chicago, shall be sent to Green Bay.

Seventh. All passengers ticketed by the Erie Railway or any of its connections it can influence or control, via the lakes, are to be ticketed via Green Bay upon like terms and conditions.

Eighth. The Green Bay and Minn. R'y Co. will, in like manner, consign to the Erie Railway all its otherwise unconsigned freights and passengers.

Ninth. It is understood the Miss. River connection of the Green Bay and Minn. R'y Co. shall be made with the boats of the "Diamond Jo Line" of steamers at Winona, for the season of 1874, Jos. Reynolds, proprietor thereof, agreeing that in rates and in all the detail connected with the movements of the property while in his charge he will favor the line via Winona with all unconsigned business in both directions during that period, and use his influence to secure business via the Green Bay and Erie line in both directions.

Tenth. All parties agree to protect the authorized bills of lading of the others, and share, in the proportions of earnings, in concealed losses and damages.

Eleventh. It is understood that the through bills of lading given for this property shall in no wise cover the marine risk, which shall always be assumed by the owners of the freight, whether upon the lakes or river.

Twelfth. To avoid a multiplicity of agents the agents of the Union Despatch in the East shall act as agents of this line, the westward bills of lading to be given by the Union Despatch Green Bay route and the agents of the Diamond Jo Line of steamers, and the Green Bay and Minn. R. R. Co. shall act as agents for it at the west, giving eastward bills of lading.

Thirteenth. This memorandum is subject to the stipulations and agree-

ments of the contract before mentioned, and to the signatures of W. Ballard, gen'l. manager, so far as it relates to lake traffic.

R. C. VILAS,
G. F. Ag't. Erie Railway Co.
THE UNION STEAMBOAT COMPANY,
By W. BALLARD, *Gen'l Manager.*
THE GREEN BAY & MINNESOTA R. R. CO.,
By H. KETCHUM, *President.*
THE JO LINE,
By JOSEPH REYNOLDS, *General Manager.*

To the introduction of which said contract in evidence the said defendant then and there excepted, and the court overruled said exception (1st exception); to which ruling of said court and to the introduction of said contract in evidence the said defendant then and there excepted (2nd exception).

41 The plaintiff then offered in evidence two resolutions of the board of directors, dated September 10, 1873, which were as follows:

Resolution.

Resolved, That the proposed contract between their company and the Union Steamboat Company has the approval of the board of directors of this company, and the execution of said contract, by the signatures of the president and secretary, and the affixing of the corporate seal of this company, be, and is hereby, authorized as of September first, A. D. 1873, and under the former corporate name and seal of their company.

Resolved, That any deficit in earnings of the two propellers provided for in the proposed contract between their company and the Union Steamboat Company below the guarantee set forth in said contract shall, if said contract is duly ratified by all parties to it, be regularly paid according to the conditions in said proposed contract, any considerations of leases, transfers of ownership of the road by this company, or public policy to the contrary notwithstanding.

Duly certified as adopted by said board by the secretary of the company, and its corporate seal thereto affixed, Sept. 10th, A. D. 1873.

To the introduction of which said resolution in evidence, the defendant, then and there excepted (3rd exception), and the court overruled said exception.

42 The said plaintiff, further to maintain the issues on its part, offered evidence showing that during the years 1876 and 1877, being the last two years included in said contract, the gross earnings received by the said plaintiff for each of the propellers run under said contract were less than the sum of forty-five thousand dollars per annum, gross earnings for each of said propellers for each of the years 1876 and 1877, and that the amount of the deficiency between the entire gross earnings of propellers run by the Union Steamboat Company under said contract during said two years, and the sum of forty-five thousand dollars per annum gross earnings for each of said propellers, guaranteed to said plaintiff by said contract, was the sum of seventy-eight thousand eight hundred and seventy-six $\frac{13}{100}$ dollars.

To the introduction of which said evidence the defendant then and there excepted (4th exception), and the court overruled said exception.

The plaintiff also gave evidence showing that it had fully performed the said contract on its part, which performance was received by defendant during the time it was rendered, and was entitled to receive the verdict and judgment hereinafter mentioned, unless said contract was ultra vires, or beyond the power of said defendant corporation to make, and plaintiff claimed defendant was estopped from objecting to the validity of the contract.

This was all the evidence offered in said case.

The court thereupon charged the jury that the said contract of guarantee contained in the said contract between the plaintiff and defendant, was a valid and a binding contract, and the said plaintiff was entitled to recover of the said defendant the amount of the deficiency shown by the evidence between the actual annual gross earnings of the said plaintiff's pro-
43 pellers run under said contract and the said stipulated sum of forty-five thousand dollars of gross earnings per annum guaranteed by said contract for each of the said propellers.

To which instruction of the said court the said defendant then and there objected and *accepted* (5th exception).

The said court further instructed and charged the said jury, in said case, that even if the said contract was unauthorized, the said parties having mutually executed the said contract, and received the benefits thereof, were estopped from objecting to the validity of the said contract.

To which charge of the said court the said defendant then and there objected and excepted (6th exception).

Whereupon the jury, on the 13th June, A. D. 1878, rendered their verdict, whereby they found for the plaintiff and against the defendant, and assessed the damages of the plaintiff at the sum of seventy-eight thousand eight hundred and seventy-six dollars and thirteen cents ($78,876.13.)

And thereupon the defendant moved for a new trial, which motion was overruled and judgment entered upon the verdict for the plaintiff, to which the defendant then and there excepted (7th exception).

And forasmuch as the foregoing facts do not appear of record, the said defendant prays that this its bill of exceptions be signed and sealed by the court, and made a part of this record.

The undersigned, R. Bunn, district judge of the western district of Wisconsin, who presided at the trial of this action, hereby certifies that
44 on the 18th day of July, 1879, the defendant's attorney presented to said judge a proposed bill of exceptions which embraced the same matter exactly embraced in the foregoing bill of exceptions, and requested it to be filed and signed nunc pro tunc as of the June term of said court for 1878. The plaintiff's attorneys objected to such application, and to allowing such bill of exceptions, or to filing. The undersigned determined to sign the same, stating in the bill, at the end thereof, the facts and circumstances, which are as follows:

This cause was tried at the June term, A. D. 1878, before the undersigned and a jury, and afterwards during the term defendant's counsel argued before the undersigned a motion for a new trial, which, on the last day of the said June term, I overruled; but as the honorable Thomas Drummond, circuit judge of the said court was then absent in Europe,

and I had not had an opportunity to consult with him on the motion before deciding it, in overruling the motion I gave the defendant the right to renew the motion before the court when Judge Drummond could be present. At the next term, which was the December term for 1878, defendant's counsel renewed the motion for a new trial before myself and Judge Drummond, and counsel were fully heard on both sides, on the 20th day of February, A. D. 1879, and the motion was decided the next day, 21 February, A. D. 1879, and the decision announced in open court; but the defendant's attorneys having returned to Chicago, were not present when such decision was announced.

On that day Judge Drummond had attended at Madison, Wisconsin, to hear that motion and some other matters, and returned to Chicago in a day or two thereafter. The defendant's attorneys have their office in Chicago, and occasionally met Judge Drummond; but he did not in-
45 form them of the decision of the motion, nor did they inquire of him, nor of the clerk of the court, nor of the undersigned, or any one who might have informed them, whether the motion had been decided, and made no effort to ascertain whether it was decided or not until after the expiration of said December term, A. D. 1878, which time expired on the 31st day of May, 1879, and said defendant's attorneys did not learn of the decision of the motion in fact until the fifth day of June, A. D. 1879, when they ascertained the fact by inquiry from Judge Drummond, at Chicago, and as soon as so informed advised me by letter of their intention to appeal, and their desire to have a bill of exceptions signed.

On these facts plaintiff's attorneys contend the defendant is not entitled to have the bill of exceptions settled, signed, and filed now.

I have concluded to sign the bill of exceptions with the statement of the facts and circumstances under which it was done.

Signed this 26th day of August, A. D. 1879, as of the last day of the December term, 1878.

R. BUNN,
Dist. Judge.

I concur in the correctness of the above statement of facts and circumstances under which the bill of exceptions was signed, so far as the matters stated have come before my observation.

46 Supreme Court of the United States.

THE UNION STEAMBOAT COMPANY
vs.
THE GREEN BAY AND MINNESOTA RAILROAD COMPANY.

Know all men by these presents that we, The Green Bay and Minnesota Railroad Company, a corporation having its principal office in the city of Green Bay and State of Wisconsin, as principal, and John I. Blair, of the county of Warren, in the State of New Jersey, as surety, are held and firmly bound unto the Union Steamboat Company in the sum of two hundred and fifty dollars, to be paid to the said Union Steamboat Company, its administrators, or assigns, to which payment well and truly to be made,

we bind *we bind* ourselves and each of us, jointly and severally, our and each of our heirs, executors, administrators, and assigns, firmly by these presents. Sealed with our seals, and dated this fourth day of September.

The condition of this obligation is such that whereas the above named Green Bay and Minnesota Railroad Company has taken an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause on the 13th day of June, A. D. 1878, by the circuit court of the United States for the western district of Wisconsin:

Now, therefore, if the above named Green Bay and Minnesota Railroad Company shall prosecute its said appeal to effect, and answer and
47 pay all costs if they should fail to make good their plea, then this obligation to be void, otherwise to remain in full force and virtue.

[SEAL.] GREEN BAY AND MINNESOTA RAILROAD COMPANY,
By E. F. HARTFIELD, JR., *Pres't.*
JOHN I. BLAIR. [SEAL.]

(Endorsed:) The within bond approved Oct. 31, 1879.
R. BUNN,
Dist. Judge.

48 *Assignment of errors.*

GREEN BAY & MINNESOTA RAILROAD COMPANY, plaintiff in error,
vs.
THE UNION STEAMBOAT COMPANY, DEFENDANT in error.

And now comes the said Green Bay and Minnesota Railroad Company, by their attorneys, E. C. & W. C. Larned, and says that there is manifest error in the record of said judgment and proceedings in the above-entitled cause and in said judgment, and for errors therein assign as follows, viz:

1st. That said judgment rendered in said cause is against the law.

2. That there is error therein in this, that the said court admitted illegal evidence to the jury on the trial of said case.

3. That the said court erred in instructing the jury on the trial of said case that the contract sued upon in said action was a valid contract and binding upon the Green Bay & Minnesota Railroad Company,
49 whereas the said court should have instructed the jury in said case that the said contract was void and not binding upon said company.

4. That the said court erred in this, that the said court instructed the jury upon the trial of said case that the said Union Steamboat Company was entitled to recover of the said Green Bay & Minnesota Railroad Company the amount of the deficiency shown by the evidence between the actual gross earnings of the said steamboat company's propellers run under said contract and the stipulated sum of forty-five thousand dollars of gross earnings per annum guaranteed by said contract to each of said propellers, whereas the said court ought to have instructed the jury that the said steamboat company were not entitled to recover any amount whatever from the said railroad company upon said contract.

OFFICE SUPREME COURT U. S.
FILED
DEC 3 1882
JAMES H. McKENNEY, Clerk.

17-98

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1882.

GREEN BAY & MINNESOTA RAILROAD COMPANY,
Plt'ff in Error,
vs.
UNION STEAMBOAT COMPANY,
Def't in Error.

Error to United States Circuit Court, Western District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

WALTER CRANSTON LARNED,
ATTORNEY FOR PLAINTIFF IN ERROR.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

IN SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1882.

GREEN BAY & MINNESOTA RAILROAD COMPANY,
Pl'ff in Error,
vs.
UNION STEAMBOAT COMPANY,
Def't in Error.

Error to United States Circuit Court, Western District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

I.

This case is brought before this court by writ of error, without the filing of any supersedeas bond.

Before proceeding to the argument of the main question in the case, it is necessary to consider a question raised by the plaintiff in the court below, as to the right of the plaintiff in error to have its bill of exceptions signed and made a part of this record. The facts, as to the signing of the bill of exceptions by the judge in the court below, appear upon pages 23 and 24 of the transcript of record. It appears from the facts, as stated by the district judge, that the counsel for the defendant in the court below were not apprised either by the judges or the clerk

of the court that a decision had been rendered in the case. It also appears that the final argument in the case was made at Madison, Wisconsin, on the 20th day of February, A. D. 1879, and that the counsel for the defendant below, both of whom resided in Chicago, returned to Chicago after making their argument in the case, and were neither of them present in court on the 21st day of February, 1879, the day upon which the decision was announced. It also appears that Judge Drummond, who participated in the decision of the case, met the attorneys for the defendants below several times after the decision had been rendered, but did not notify them that any decision had been made; nor did the clerk of the court or the district judge notify them, and, as a matter of fact, the first information which they had that the case had been decided was received on the 5th of June following. Immediately upon learning that the case had been decided adversely to the defendant below, counsel for defendant made an application to have a bill of exceptions signed and filed *nunc pro tunc* as of the term at which the case had been decided.

The counsel for the plaintiff below objected to the signing and filing of such bill of exceptions, and, after argument, it was decided by Judge Bunn that he would sign the bill of exceptions and append thereto a statement of the facts and circumstances under which it was signed.

It is the doctrine of this court, settled by repeated cases, that a bill of exceptions may be signed after the term has gone by, where the delay has been occasioned by the default of the court, or for the convenience of the court, or under circumstances so unusual as to justify such action.

It is contended that the present case falls within the ruling of this court upon two of these points. It is evident, upon the face of Judge Bunn's certificate, that the attorneys for the defendant below were not resident at Madison, but were there merely to argue this case. It can hardly be expected that they shall take their time, in the midst of the busiest season of the year, away from their office and places of business, to wait after the argument of the case, a decision which may be rendered at once or may not be rendered for weeks. Under such circumstances, it would seem clearly to be the duty of the clerk to notify attorneys living at a great distance who were not present when the decision was rendered, because they had been obliged to return to their houses, that such a decision had been rendered. Nor is it the duty of attorneys to inquire of judges when they will render decisions; but they are to wait the pleasure of the court, which it is to be presumed will render its decision in apt season.

Under the circumstances of this case we contend that the defendant's attorneys were entirely without fault in the matter, and that the sole cause of the delay in signing the bill of exceptions was the neglect of the clerk to notify the attorneys, who were living in Chicago, that such a decision had been made.

In the case of *Müller* v. *Ehlers*, 91 U. S., 249, it is stated *that under ordinary circumstances* a bill of exceptions ought not to be filed and signed at a term later than the term at which the judgment was rendered; but the court recognizes that, under extraordinary circumstances, it may be necessary to file and sign the bill of exceptions even at a later term. That case was not so strong as the

present case, because it appears that in that case the bill of exceptions was signed and filed by order of the court, without the consent of the plaintiff, and even without his knowledge. In this case it appears that the plaintiff's attorneys below were present when the defendant's attorneys applied to the judge to have such bill of exceptions signed, and that they objected to such application. This whole application, therefore, was made upon due notice, and in the presence of the attorneys for the plaintiff. Moreover, it is to be noted that no supersedeas bond was filed in the case, and therefore all that the defendant below seeks is to have the legal questions raised upon the trial below fairly considered by this court, without any attempt to delay or harass the plaintiff below in the collection of its judgment, if it desired to collect it.

In the case of *Sage* v. *The Central Railroad of Iowa*, 93 U. S., 412, it is admitted on page 417 that the court may enter an order in the case *nunc pro tunc*, where the action asked for has been delayed by or for the convenience of the court; *a fortiori*, would this be the case where such action had been delayed by the fault of the court. And on page 417, in the same case, it is said, "to make a *nunc pro tunc* order effectual for such pur-"poses, it must appear that the delay was the act of the "court, and not of the parties, and that injustice will not "be done." As this court has admitted in these two cases the power of a court to enter a *nunc pro tunc* order in a case like the present one, if the circumstances of the case are such as to justify it or make it necessary, we respectfully contend that the circumstances of this case are such as to make such action on the part of the court both just and necessary. It cannot fairly be said that the plaintiff in error here, or its attorneys, are in fault in not

learning earlier of the decision of the case, and of course no action could be taken towards preparing the bill of exceptions until the case was decided.

If, however, this court shall take a different view, and strike the bill of exceptions from the record, an examination of the pleadings will show that the main point upon which the plaintiff in error relies is sufficiently presented upon the pleadings themselves, without reference to the bill of exceptions. It is shown by the declaration in the case that the action is founded upon a contract of guarantee alleged to have been entered into between the two parties to this suit; and it appears, from the answer of the defendant below, that the right to make such a contract of guarantee is denied; and it further appears from the reply of the plaintiff below that the promissory notes which constitute the cause of action of the plaintiff below, in the fifth, sixth, seventh, eighth, ninth, tenth and eleventh counts of the declaration, were all based upon a settlement of differences growing out of this same contract of guarantee. Now, in the absence of any proof, the utmost which the court can presume is, that the allegations of the declaration and reply were sustained by the proofs. Such being the rule, the main question which it is desired to argue here can be presented to this court in the same way as though it were raised upon a demurrer to the declaration. And upon the question raised in this way upon the pleadings alone, it is contended that the Green Bay and Minnesota Railroad Company had no power to make the contract in question, and that the act of the contractors or officers of such company, in attempting to make such contract, was unauthorized, *ultra vires*, and totally void,

and that such contract cannot be the foundation of an action for damages.

The defendant in error is a corporation in Buffalo, in the State of New York, owning and running propellers on the lakes.

The plaintiff in error is a corporation of the State of Wisconsin, empowered to construct a railroad from Winona, on the Mississippi, to Green Bay, on Lake Michigan.

On the 9th of September, 1873, after plaintiff in error had completed its road to Green Bay, it entered into a contract, in writing, with the defendants in error, which contract furnishes the sole cause of action in the case.

A copy of the contract is found on pages 15 to 22, Transcript of Record.

The charter of the railroad company which was approved April 12, 1866, is fonnd in the Laws of Wisconsin of 1866, page 1331.

The principal clauses therein, which have any bearing upon the present issue, are as follows:

SECTION 5. The said company shall have authority and power, and they are hereby authorized and empowered to survey, locate, &c., maintain and operate, a railroad from a point near Green Bay, to some point on Lake Pepin, or opposite the city of Wabashaw, in the State of Minnesota.

To transport persons and property on said road, by steam, mechanical or other power.

To make side tracks, and tracks connecting such road with any other which it may intersect.

To construct depots, &c.

To connect its railroad with with any other railroad in this state; and operate the same in connection with such other railroad.

To lease or purchase from any other railroad company the whole or any part of any railroad.

SEC. 7. The directors shall have power to make such contracts with any person or corporation whatsoever, as the construction of their railroad, or its management, and the convenience and interest of the company, and the conduct of its affairs may in their judgment require.

Also, to lease or sell the road, or any part of it, perpetually, or for a limited time.

SEC. 9. Confers the power to borrow money and issue securities for its payment, by bond, mortgage, &c., to raise money to be used in the discharge of any liabilities that it may incur in the construction, repair, equipment or running of said road, and the powers of said corporation, for the purpose aforesaid, and for all purposes necessary to carry out THE OBJECTS OF SAID COMPANY, namely: THE CONSTRUCTION OF A railroad from and to the points aforesaid, are hereby ratified and confirmed, &c.

By the acts of March 23, 1867, and March 4, 1868, the corporation was empowered to build a bridge across the Mississippi, at a point therein specified, and by the act of March 5, 1869, it was empowered to erect a bridge across the Fox River, at Green Bay.

In the general Railroad Law, 1 Taylor's digest, 1036, Sec. 3, it is provided that,

It shall be lawful for such companies to *build, construct and run, as a part of their corporate property*, such number of steamboats, or vessels, as they may deem necessary

to facilitate the business operations of such company, or companies.

The railroad company, by the contract in question, undertook, in consideration that the steamboat company would run certain propellers between Green Bay and various ports on the great lakes, to guarantee to such company, for the term of five years, that each of the said propellers should receive, during each year, gross earnings to the amount of $45,000.

The propellers failed to receive the amount of earnings stipulated, during the seasons of 1876 and 1877, and this action is brought to recover the said deficiency.

The question to be determined is: Is such contract one which said railroad company was authorized to make; or, is it *ultra vires*, and invalid, so that no action at law upon it for the alleged deficiency can be sustained?

The plaintiff in error insists that the contract was wholly unauthorized and void, and can not support this action.

The question in this case arises solely upon the contract itself, and is not complicated or embarrassed, as in many other cases, with any rights, equities or estoppels, arising out of the possession by the railroad company of any funds or property received by it under or as the consideration of the contract, whose fruits they are retaining, while at the same time seeking to repudiate the contract.

In such cases the courts have sometimes, while refusing to sustain an action upon the contract, allowed a claim upon a *quantum meruit*, for the value of such materials and labor as had been actually received under such invalid contract.

But in the present case there was no evidence that any money or property of the plaintiffs was received or retained by the defendants on account of this contract. There was no evidence offered on which a *quantum meruit* could be based, nor is there any allegation in the pleadings which could support a *quantum meruit*, if the case should be considered upon the pleadings alone, as though a demurrer to the complaint had been interposed.

The defendants in error were the owners of a line of propellers, which they used to carry freight and passengers, for hire, as common carriers. They ran some of these propellers between the terminus of the railroad company's line at Green Bay, and other ports, receiving such freights and passengers as were offered, either by the railroad company or by other parties, and charging and receiving for such freights the usual rates for such services.

Outside of and independent of the special contract, there could be no liability of any kind, on the part of the railroad company, to pay any moneys to the steamboat company, on account of any such freights.

If the steamboat company neglected or refused to send any propellers to Green Bay, to transport such freight and passengers, no action against them would lie on that account, unless by reason of the *contract;* and, on the other hand, the claim of the steamboat company to recover for any deficiency in the amount of its freights, finds its support in the contract, and in that alone.

Nor is this the case of an EXECUTED contract where the consideration has been paid, and the party is seeking to recover it back. So far as the plaintiff in error is concerned, this is an executory contract which the defendant

in error is seeking in this action to enforce against the plaintiff in error.

Talmadge v. *Pell*, 7 N. Y., (3 Sel.), 346.
Madison Plank Road Co. v. *Watertown P. R. Co.*, 7 Wisconsin, 59.

There is nothing in the evidence which shows that the plaintiff in error has ever received any actual consideration whatever for the guaranty contained in this contract.

It may be conjectured, or perhaps fairly presumed, that it would be desirable and convenient for the railroad company to have their propellers run between Green Bay and the various ports named, but that any pecuniary benefit would thereby be secured by the railway company nowhere appears. There is nothing in the pleadings or in the evidence which shows that there was any necessity for any such contract, in order to secure all needed facilities for the forwarding of freight passing over the railroad to Green Bay, and destined for any of the points named in the contract. *Non constat* that this very steamboat company would not have sent these propellers in the same way if the contract had not been made, or if not, whether other propellers or vessels, equally well fitted to do the business, would not have offered themselves.

Upon general business principles, in the absence of any testimony one way or the other, we are fairly entitled to the presumption that where there were freight and passengers needing to be forwarded, there would be furnished the needed transportation facilities which the business demanded.

At all events, there is nothing in the case which shows the receipt or possession by the railroad company of any

pecuniary or other benefits of any kind under this contract.

The steamboat company received the freight and passengers, and collected the usual charges of transportation from them in the regular course of business—and have retained all the moneys so derived. The railroad company has received nothing.

Nor is there any question as to the want of notice or knowledge on the part of the plaintiff below of the want of power to make the contract in question. Both parties, in this respect, stand *in pari delicto*. Neither has any advantage or equity superior to the other, and no estoppel exists against either to deny the validity of the contract.

The contract, on its face, refers to the defendant as a railroad company, incorporated by the laws of Wisconsin, to build a railway at the place designated, and the charter so referred to is declared on its face to be a *public* act. So that the plaintiffs were charged by law with knowledge of all its provisions, and were bound by all legal limitations upon its powers which the law imposed.

We are therefore brought to the naked question, whether the railroad company had the legal authority to make the contract sued upon. If it had not, this action cannot be sustained.

The principal provisions of the contract are:

That the Union Steamboat Company will run certain propellers between Green Bay and Buffalo, touching at Cleveland, Detroit, Port Huron, and Mackinac, during the season of navigation, for a term of five years after the date of the contract.

The railroad company guarantees to each of said pro-

pellers gross earnings to the amount of $45,000 during each season.

The steamboat company collects and receives all the freight, and if the amount received exceeds the sum of $45,000, it retains the entire amount, whatever it may be. If the amount so received is less than $45,000, the railroad company is to make good the deficiency.

In addition, the railroad company agrees to furnish free dockage, warehouses and agencies, and various other advantages. It binds itself not to buy or hold any direct or indirect interest in any boats running in competition with those of the steamboat company upon the specified routes.

The contract in question was approved by a resolution of the board of directors, but has never been submitted to the stockholders, or approved by them. Neither of these facts is alleged by the pleadings, but the proof showed resolutions of the board of directors approving the contract, but no action by the stockholders.

We submit that the railroad company had no power to make this contract.

The rule of law in relation to what powers corporations may exercise is well settled, at least in the Federal courts.

In *Bank of U. S.* v. *Dandridge*, 12 Wheat., 64, the court held that: "Corporations created by the statute "must depend, *both for their powers and the mode of ex-* "*ercising them*, upon the construction of the statute."

In *Head* v. *Ins. Co.*, 2 Cranch, 127, C. J. MARSHALL says: "The corporation is precisely what the incorpor- "ating act has made it. It derives all its power from that "act, and is capable of exerting its faculties *only in the* "*manner the act authorizes.*"

And in *Bank of Augusta* v. *Earle*, 13 Peters, 281, where the above and other cases are cited and approved, the court say:

"It cannot be necessary to add to these authorities, and "it may be safely assumed that a corporation can make no "contracts and do no acts except such as are authorized "by its charter, and these acts must be done *in such* "*manner* as the charter authorizes."

There is no pretense that this charter, *in express terms*, authorizes the making of any contract of any kind in relation to the running of steamboats. The word steamboat does not occur in the charter.

It is claimed, however, that the power to make such a contract is conferred by the language of the seventh section of the act, conferring on the directors the power "to make such covenants, contracts and agreements as "the construction of their railroad or its management, "and the convenience and interest of the company, and "the conduct of its affairs may, in their judgment, "require."

If this phraseology were to be construed to confer power to make any and all contracts whatever, the railroad company would have the power to establish a bank —a college—to purchase farms, and raise stock and grain —to build manufacturing establishments and villages along their route—for all these might be useful and advantageous for the conduct of the affairs of the railroad, and might promote its business and prosperity. It is admitted that no such powers as these could be lawfully exercised under this charter; and it follows, of course, that the words referred to are to be limited and qualified to some extent.

Such a limitation is this. The company is incorporated to build and run a railroad between certain specified points. The purpose and object is expressly declared in section 9 to be "*the construction of a railroad from and* "*to the points*" designated; and the powers of said corporation *for such purpose, and for all purposes necessary to carry out the said objects*, were thereby ratified and confirmed.

All the powers given, however broad the phraseology, are to be construed as powers to do such acts, and make such contracts as pertain to and are within the scope of the objects and purposes for which the charter is granted; that is, in the present case, such powers as appertain, or are incident to the construction and operation of a railroad between the given termini, and no others.

It is not intended, under these general words, to authorize this company to make contracts for the building and running of railroads all over the state, but only to build that special line of road, with its connections. It is not intended to authorize it to make contracts for the construction of a manufacturing establishment, or the running of a bank, or the building of a college, but to make contracts incident to the construction and manngement of the specified railroad authorized by the charter to be constructed; and that is all the charter authorizes. The power to guarantee the profits of a line of steamers is not given in the charter, nor is it an incident to any specific power which is given.

"It would be absurd to hold that the directors, under "the idea of incidental power, might do everything which "they thought would bring passengers on to their road. "Such a limit is no limit. If they could do this, under such

"a pretense, they could by direct appropriation of the "company's funds build manufacturing villages along the "road, and run steamboats to New York in connection "with their road, for this might increase their business.

"An incidental power is one that is directly and imme- "diately appropriate to the execution of the specific power "granted, and not one that has a slight or remote relation "to it. Stages and steamboats are not such. They are "unnecessary in running cars over a railroad."

Hood v. *N. Y. & N. H. R. R. Co.*, 22d Conn., 16.

That no larger or more extended meaning was intended by the use of this phraseology is apparent from the charter itself, which, after using these general expressions, which, taken in an unqualified and unrestricted sense, would give authority to make any contracts of any description which the directors deemed advantageous or desirable, proceeds to grant specially the power to lease, and other powers.

It must, therefore, be admitted that all the powers which are conferred by this charter, are to make such contracts, and do such acts as are necessary, expedient, or desirable for the *construction and operation of a railroad between the points specified in the charter.*

That the power to guarantee the profits of a line of propellers which ran to one of the terminal points of the railroad, would not be a power which could be exercised by the railroad company under this charter, is evident, both upon principle and authority.

In construing a charter granted by the laws of Wisconsin, the decisions of the Supreme court of that state

would of course be entitled to great consideration, if they were not regarded as absolutely binding upon the court.

The Supreme court have in a similar case established a rule of construction, which, applied to the case at bar, would render this action untenable.

In *Madison W. & M. Plank Road Company* v. *Watertown & P. P. R. Co.*, 7 Wis., 59.

The M. W. & M. was created and incorporated in Wisconsin, to construct and maintain a plank road from Milwaukee to Watertown, and then onward to Madison.

They proceeded to construct the road, and had done so as far as Watertown. In the mean time, the defendants' company was incorporated to construct a plank road westerly from Watertown along a route nearly identical with that of the first corporation—and that company, believing that it would better subserve the objects and interests of their company to have the last named company construct the road, guaranteed the bonds of such company, on which money was raised and used in the construction of such plank road.

The Supreme court held that the contract of guaranty could not be sustained. That "*the charter of the plain-*"*tiffs conferred only the ordinary powers necessary for* "*purpose of constuucting their road. It gave no more.*"

The signing of the guaranty by the complainants for the purpose stated *was clearly without authority, and created no legal obligation.*

This decision seems absolutely decisive of the case at bar.

In *N. W. U. Packet Co.* v. *Shaw*, 37 Wis., 655, a corporation having been created as a common carrier on the

Mississippi river, and to erect levees, &c., docks and warehouses, and to do any and all acts necessary to an economical and successful prosecution of their business, and to borrow money and enter into any arrangement, agreement or contract in reference to storing, fowarding or freighting any kind of property, or to any and all business incidental to or arising from the transportation of persons and property, it was held:

That no other or different business than is mentioned in the charter is authorized thereby.

That the articles contemplate that the business of the plaintiff should be confined to that of a common carrier. "Of course, as a common carrier, the plaintiff has power "to make all contracts necessary perhaps convenient to "the company in that business.

"The question to be determined is, whether the plain- "tiff can lawfully buy and sell the produce of the country "in the same manner and to the same extent that a natu- "ral person may. We think this question must be "answered in the negative.

"There is no necessary connection between the busi- "ness of a common carrier, and that of buying and sell- "ing the commodities which the carrier transports. We "conclude that *the contract is ultra vires, and that no claim "for damages resulting from a breach thereof can be suc- "cessfully asserted by either party.*"

In *Rock River Bank* v. *Sherwood*, 10 Wis., 230, the court held that a corporation is not only incapable of making contracts, "which are forbidden by its charter, "but in general *it can make none which are not necessary, "either directly or indirectly, to effect the object of its "creation.*"

"And that where a corporation undertakes to make a "contract entirely foreign to the purposes and objects of "its creation, such contracts are void."

The case of *Madison, &c.*, v. *P. Road Co.*, 7 Wis., 59, *supra*, was considered and approved.

The same strict construction of charters and the restriction of the corporations to the exercise of the powers conferred, and for the objects stated, is found in the cases of

Clarke v. *Farrington*, 11 Wis., 323, 324.
Waldo v. *Ch. & St. P. R. R. Co.*, 14 Wis., 580.

The case of *Coleman* v. *East Counties R. R. Co.*, 10 Beavan, is almost identical with the case at bar.

The facts in this case were briefly as follows: The Eastern Counties Railway Company and the Eastern Union Railway Company had built a railroad from London to a point within ten miles of the port of Harwich. The directors of the companies conceived that it would be to the advantage of the railroad if a steam packet company could be formed between Harwich and the northern ports of Europe. Accordingly the directors took measures to have such a company organized; and, among other things, it was arranged that the packet company should have a guarantee from the railroad company of a dividend of five per cent. per annum upon their paid up capital, and upon dissolution of the packet company the railroad company was to pay the whole paid up capital of the packet company upon transfer of its assets and property.

The plaintiff, who was a shareholder in the railroad

company, filed a bill to enjoin the company from entering into this arrangement.

Upon this state of the facts the master of the rolls says, on page 14 : "But it being the interest of the public to "protect the private rights of all individuals, and to defend "them from all liabilities beyond those necessarily occa- "sioned by the powers given by the several acts, those "powers must always be carefully looked to; and I am "clearly of opinion that the powers which are given by "an act of parliament, like that now in question, extend "no farther than is expressly stated in the act, or is neces- "sarily and properly required for carrying into effect the "undertaking and works which the act has expressly "sanctioned." And again: "But it is contended that "they (railroad companies) have a right to pledge with- "out limit the funds of the company for the encourage- "ment of other transactions, however various and exten- "sive, provided the object of that liability is to increase "the traffic upon the railway, and thereby to increase the "profit to the shareholders. *There is, however, no authority "for anything of that kind.*"

The master of the rolls draws the distinction between the railroad company going into the steamboat business themselves and guaranteeing profits to other parties who manage it, and says surely the latter arrangement could not be authorized by the act of parliament.

And again, on page 17: "But I must say that, in my "opinion, to pledge the funds of this company for the "purpose of supporting another company engaged in a "hazardous speculation, is a thing which, according to "the terms of this act of parliament, they had not the "right to do."

The directors might commit small excesses of authority and go thus beyond the strict letter of the act, and the shareholders might never object; but the true principle is laid down by the master of the rolls, on page 18, where he says: "I believe they have the power to do all such "things as are necessary and proper, for the purpose of "carrying out the intention of the act of parliament, and "*they have no power of doing anything beyond it.*" He then goes on to urge the extreme importance of protecting the vast property invested in railways, and preventing the exposure of it to losses by any speculations, however plausible they might appear. The injunction is made perpetual.

We have dwelt at some length upon this case, because it is a leading case on this subject, and especially because it is cited, commented fully upon, and entirely approved by the Supreme court of the United States in the case of *Pearce* v. *Madison, &c., R. R.*, 21 Howard, 441, and is therefore a controlling authority upon this court.

It will be attempted to draw the distinction between the case just quoted and the case at bar, that in the former an injunction was asked before the contract was signed; here, a recovery upon the contract is resisted. In other words, that the contract was not executed in the case in Beavan, but is executed in the case at bar. This distinction is wholly untenable, inasmuch as the contract is not an executed contract in the case at bar any more than in the case in Beavan. It is not executed until the money is paid. If the railroad company has paid the money, and were now seeking to recover it back, that would be a case of an executed contract. Or, if the company had bought a steamboat for which, while retaining it, they re-

fused to pay, a different case from that in Beavan would be presented.

That the contract in the case at bar is not an executed one is shown by the cases of *Talmadge* v. *Pell*, and *Madison Plank R. Co.* v. *Watertown Plank R. Co.*, already referred to. Defendant in error here is seeking to enforce execution of this contract, and the stockholders forming the railroad company are objecting to the execution of the contract, and so far as appears from the testimony, we have already shown that no benefit or advantage, no fruit of the contract can be said to have been received by the the railroad company. Looked at in the light of these principles, it seems that no effectual distinction can be drawn between this case and that in 10 Beavan; and as the case in 10 Beavan is the law of this court, it seems to us to be virtually decisive of this case.

The case of the *East Anglian Railway Co.* v. *Eastern Counties Railway Co.*, 11 Common Bench, 775, is also cited and approved in *Pearce* v. *Madison, &c., R. R.*, in the 21 Howard. The facts in this case were as follows: A perpetual lease of the East Anglian Company was made to the Eastern Counties Company. One of the agreements in the contract between the two companies was, that the latter company should pay to the former all the expenses incurred in preparing and promoting certain bills in parliament designed to secure extensions and privileges to the East Anglian Company, which would under the lease enure to the benefit of the Eastern Counties Railway Company. In this case the contract between the companies had been signed and sealed, and many of its provisions performed, but the money paid by the East Anglian Company for the purposes of promoting the bills

in parliament, had not been repaid by the Eastern Counties Company, although the bills had paseed.

There was a general provision in the charter of the Eastern Counties Company, quoted on page 808, authorizing said company, among other things, "to make and "enter into any other contract with any other railway "company that may be deemed advisable." And it was contended, just as it is in the case at bar, that this general language covered the contract between the two railway companies, which was the subject of the action.

The court held that no action could be maintained upon the contract, because the defendant was incorporated for the purpose of building and running a certain railway, and nothing else, and procuring the passage of bills in parliament was not within its authorized powers. And it did not make the least difference that the passage of these bills might be very advantageous to the company, and materially increase its profits. This case is valuable as showing that general words in a charter must be construed in connection with its whole meaning and scope, and as giving the only true test of contracts made by corporations, namely, whether or not they are within the scope and meaning of the act of incorporation properly construed.

The case of *South Wales R. R. Co.* v. *Redmond*, in 10 Common Bench, N. S., 675, may be cited in opposition to the case above quoted. It is said by Green, in his notes to Brice's Ultra Vires, that the two cases are difficult to reconcile. If this be so, the one above quoted is to be preferred in this court, as it has received the express sanction and approval of the Supreme court of the United States, in the Pearce case, in 21 Howard; whereas, the

South Wales case has not been approved by our Supreme court at all.

But, it seems to us that the South Wales case is easily reconcilable with the Eastern Counties case. The same test is applied to the contract in both cases, namely, whether or not it was within the scope and purpose of the act of incorporation. In the South Wales case the decision is expressly based upon the ground that the evident intention of parliament was to incorporate a railroad for the purpose of transporting passengers and freight, not merely to Milford Haven, but to Ireland; to establish a line of communication from London to Ireland. Hence, a contract by which the railroad leased steamers to transport passengers and freight across the channel to Ireland, was held not to be *ultra vires*. The contract in this case was a lease, which is very different from a guarantee, which was the case in 10 Beavan, and also in the case at bar. The South Wales case does not, therefore, conflict with either of the cases above cited, and certainly does not overrule them, but, on the contrary, approves them expressly.

We also call attention to the case of *Munt* v. *Shrewsbury and Chester R. R. Co.*, 20 Law Journal Rep., part I Chancery, page 169. This was a bill brought by a shareholder to restrain the company from using any of its funds for the promotion of a bill in parliament, which bill was to authorize the improvement by the railroad company of the navigation of the river Dee. The company was, among other things, empowered to build and operate a railroad to a point on the river Dee, and to build wharves and warehouses, and operate the same upon the said river. It was argued that inasmuch as the company's prosperity depended upon the navigation of that river

being in a good condition, and inasmuch as its charter contained privileges of wharfing, which showed the intention of parliament to connect the company closely with the river, that therefore the improvement of the navigation of that river ought to be considered an incidental power belonging to the company. The court, however, overruled the argument altogether, on the ground that their charter contained no express power either to improve the navigation of the river Dee, or to promote bills in parliament for the purpose of obtaining power so to improve it. The funds of the company were only applicable to the purposes enumerated in the act. An injunction was granted not only against expending money upon the bills in parliament, but also against expending any in the improvement of the navigation of the river.

The same general doctrine is approved in *Taylor* v. *Chichester R. R.*, 2 Law Rep. (Exch.), 356, decided in the year 1867, which case expressly affirms the above case of *East Anglian R. R.* v. *Eastern Counties R. R.* above quoted.

The opinion of Lord CAMPBELL in the case of *Mayor of Norfolk* v. *Norfolk R. R.*, 4 Ellis & B., 397, is valuable as a statement of the law on this question. On page 445 he says: "The equity reports abound with cases in "which injunctions have been granted against the appli- "cation of the funds of such companies to purposes not "authorized by the acts of parliament creating them, al- "though professedly for the benefit of the shareholders; "and I apprehend *that a contract against the performance* "*of which an injunction would be granted in equity, must* "*be considered illegal and void at law, on proof that to the* "*knowledge of both parties it is beyond the power of the*

"*directors, and leads to a misapplication of the funds of* "*the company.*" This language disposes of the objection which has been raised in this case, that cases where an injunction was granted in equity, are not in point in deciding whether an action at law can be maintained upon a contract after it has been made.

Turning from the English authorities to those in this country, we will examine first the case of *Pearce* v. *Madison, &c., R. R. Co.*, 21 Howard, 441, already alluded to. In this case, two railroad corporations had united together, forming a single line. The consolidated corporation had purchased a steamboat, to be run upon the Ohio river in connection with the railroad, and had given notes for the purchase money. Plaintiff sued as endorsee of the notes. The court held the contract of purchase and the notes given in fulfillment thereof *ultra vires* and void, for two reasons; first, because there was no authority for the two corporations to consolidate, and, second, because they had no authority, either separately or jointly, to purchase a steamboat. It will be observed that this is a case where the contract had been made, and the notes given, and it was a mere question of paying money on the notes, just as in the case at bar it is a question of paying money upon this contract. That case, like the case at bar, presented the naked legal question whether or not such a contract could be enforced, and the Supreme court held it could not be. This case relies upon the cases in 10 Beavan and 11 C. B., already quoted.

We next refer to the case of *Perrine* v. *The Chesapeake and Delaware Canal Company*, 9 Howard, 172. In that case, the defendant had been incorporated to build and operate a canal between the Chesapeake and Dela-

ware bays. Its charter fixed rates of toll upon vessels loaded with merchandise and upon empty vessels, but made no provision for tolls upon passengers. There were two questions raised, whether the company had power to levy toll upon passengers, and whether it had power to refuse right of passage to a vessel on which were passengers, unless toll were paid on the passengers. The Supreme court, in a very full opinion, by TANEY, C. J., decided both points in the negative, upon the ground that the language of the charter did not cover either power. The canal was made a public highway, and hence vessels could pass through, and as the power to levy tolls was one favorable to the company, and against the public, it must be strictly construed, and as no toll on passengers was expressly granted, none could be taken.

This case well illustrates the strictness with which the Supreme court are disposed to hold corporations within their chartered powers, even in cases like this, where extreme hardship to the corporation was the result. In the case at bar no *express* power to guarantee the profits of a steamboat line is claimed to have been given, hence under the above decision no such power could be exercised.

In *Clearwater* v. *Meredith*, 1 Wall., 40, the principle is well stated that new liabilities and new responsibilities cannot be added to the original undertaking into which a stockholder of a corporation enters, without his consent.

In the state courts, the cases of *Talmadge* v. *Pell*, 7 N. Y., 344, and *Hood* v. *N. Y. & N. H. R. R. Co.*, 22 Conn., 502, have already been referred to, as have also the cases in Wisconsin.

There is a case in Maryland, *Steamboat Company* v. *Dandridge*, 8 Gill. & John., 318, which presents the fol-

lowing state of facts: A company was incorporated "for the purpose of establishing and conducting a line or "lines of steamboat between P. and B. for the convey- "ance of passengers and transportation of merchandise "and other articles." A contract made by this company for breaking ice and towing out a vessel was held to be *ultra vires*. On page 318 is a forcible discussion of the general principles governing the doctrine of *ultra vires*.

The case of *Downing* v. *The Mount Washington Road Company*, 40 N. H., 230, illustrates the strictness with which courts hold corporations within their chartered powers. The company was organized and incorporated to build a road to the summit of Mount Washington. They were also authorized to erect and maintain, lease and dispose of, any toll houses, or any other buildings found convenient for the accommodation of their business. They purchased certain stages from Downing, which they used upon the road. It was held that the purchase was unauthorized and void, and assumpsit upon the notes given for the purchase money would not lie.

There is a case in North Carolina, *Wiswall* v. *Greenville Co.*, 3 Jones Eq., 183, which is very similar in its facts to this New Hampshire case, and follows the principle of that case exactly.

The cases in Illinois, Vermont, New York, and other states, which will be quoted in opposition to the doctrine maintained by defendant in the case at bar, are uniformly distinguishable, because they proceed upon the theory that where a corporation retains the fruits of a contract, and refuses to return them, honesty and the law of estoppel prevent it from asserting the doctrine of *ultra*

vires, and thereby seeking to avoid payment. Though the contract may be void, yet a recovery will be allowed upon a *quantum meruit*. It has already been shown that this principle does not apply to the case at bar. There is not the least evidence upon which a *quantum meruit* could be based, nor anything to show that the defendant below has reaped any benefit or advantage whatever from the contract which might not have accrued to it equally well without the contract. Independent of the contract itself, defendant below owes plaintiff below nothing. Plaintiff in error has no money or property belonging to defendant in error, nor is it shown that the steamboat company has lost any money by complying with the contract, or that the railroad company has gained anything by complying with it. There is, therefore, no controlling equity in favor of plaintiff below, and no estoppel against defendant below.

It thus appears that the language of the charter does not authorize the contract upon which this action is based, and that such a contract is entirely outside of the scope and intent of the act of incorporation.

It also appears, both upon principle and authority, that railroad corporations in general have no power to make such a contract as this, and that no recovery upon such a contract can be allowed under the general principles of the law of corporations. Unless some special direct authority to make such a contract can be found, therefore, the authority does not exist, and the contract is void, and can sustain no action, either at law or in equity.

It remains to examine whether the railroad law, before, cited, confers any such authority. If it does not, no authority can be found for the railroad company to made

this contract, since its own charter, the general principles of the law of corporations, and the special railroad legislation of Wisconsin, comprise all the sources from whence such an authority could be derived.

We contend that the third section of the General Rail Road Law, before cited, does not confer authority to make the contract in question.

The law gives to railroads a power to *build, construct and run, as a part of their corporate property*, steamboats or vessels, to facilitate the business and operations of said companies.

It is manifest by this provision of the law, that the legislature did not consider that railroad companies could, under their general power to construct and operate *railroads*, coostruct and run *steamboats*, and in view of the many water courses and lakes in Wisconsin, the power in question was given to them, but it was given in a careful and guarded manner. They were authorized to construct and run them as a *part of their corporate property.*

This provision of the statute was doubtless framed with the view of preventing any indiscriminate and unrestricted operations and speculations by railroad companies in the general business of steamboating. To give them such a power would be disastrous to the interests of the stockholders, and against public policy. They were only to construct and run them as a part of their corporate property, which would limit them to such as the business of their own special line required.

There is a wide difference between such power as this and the power to guarantee the profits in lines of steamers

run by other parties, which has been attempted to be exercised in this case.

To permit such a power to a railroad company would enable any board of directors to bankrupt the road in a short time without the knowledge of the stockholders.

If the board only exercised the statutory power, their action would be open and known to the stockholders. The boats built and run must be paid for when obtained. They are held as a part of the corporate property. If their employment proves unprofitable, they can be disposed of, and their use discontinued; but under such contracts of guarantee as this, the railroad company may be secretly pledged for years to the payment of profits to various steamboat lines all over the state; or, as in the case at bar, from other and distant states, and involved in liabilities to vast amounts.

In this very case the liabilities incurred to a single line amounted to nearly a half a million of dollars, and were extended over five years; but similar contracts might, with the same propriety, have been made with any number of propellers, steamboats and sailing vessels, and the property of the stockholders invested in this enterprise subjected, without their knowledge or consent, to the risk and liabilities of other businesses and enterprises, entirely foreign to the object of its creation.

The defendant in error, in order to find authority in this statute to sustain such a contract as this, must ignore entirely the words "as a part of their corporate property." But it is a well settled rule in the construction of statutes that "Words in a statute are never to be construed as un-
"meaning or surplusage, if a construction can be legiti-

"mately found which will give force to and preserve all "the words of the act."

Potter's Dwarris on Sat., p. 79 and notes.
Leversee v. *Reynolds*, 13 Iowa, 310.
U. S. v. *Barsell*, 3 Story, 389.

There is no evidence or allegation that this contract has ever been submitted to or approved by the stockholders nor is there any evidence that they were ever notified of its existence.

There is nothing in the mere fact of the running of the propellers of the plaintiff from Green Bay to other ports to give any notice or even give ground for a suspicion of the existence of any such contract as this. It is natural that where there is business to do for steamboats, steamboats will come to do it. . The secret character of such agreements and the power which they would afford to the directors to involve the corporation in risks and liabilities which the stockholders never agreed to assume, constitute two of the strongest objections to the allowance of such a power.

So far as the case discloses, the railroad company could by no posibility derive any pecuniary advantage from this contract.

It imposed heavy burdens on the railroad company, but so far as appears afforded no consideration therefor, and brought no benefits in return. The propellers were to collect and retain all the freights, no matter to what they amounted. But if they failed to reach the sum of $45,000 for the season. the railroad company was to make good the amount.

It is difficult, so far as the facts in evidence appear, to

find any sufficient consideration on the part of the railroad company, to support so one-sided and unequal an agreement.

Such a contract would be a most unwise one in every respect. It would make the steamboat company careless and indifferent as to the freighting business. Their trade was secured in advance. The effect of the contract was against public policy, by preventing the competition which prevents monopoly prices.

So far from this contract being one which can derive any support from the clause of the statute in question, this contract, on the contrary, expressly prevents and prohibts the company from exercising the power conferred by the statute.

In this contract the railroad company binds itself not to buy, accept or hold any direct or indirect interest in any boats or vessels running to or from Green Bay in competition with the interests of the steamboat company.

It expressly takes from the railroad company, upon the route specified, the power "to build, construct or run" any steamers or vessels in connection with their railroad, and the company entered into this contract to guarantee the profits of the special line, in favor of whose exclusive monopoly they have thus deprived themselves of all their rights and privileges under the statute.

It was asked in argument whether we would deny that the railroad company could *lease* steamers under this statutory power. It is entirely unnecessary for the purposes of this case, to decide that question. But, admitting that they could lease, the railroad company would still be in the visible possession and use of the steamboats, and

quoad the leasehold interest, using it as their corporate property.

It would certainly be open to question whether a power to "build, construct *and* run" steamboats, as a part of the corporate property, would include a power to lease. The strict language of the act certainly does not include the power to lease, and inasmuch as any such power as this conferred upon a railroad must be strictly construed, and cannot be in any way extended by implication, it might well be argued that the power to lease was not conferred.

But if the argument against the power to lease being conferred by the act, is so strong, how much stronger is the position that a contract to guarantee profits to independent steamboat companies could not possibly be included within the terms, intent or meaning of this act. In the case of a lease, the company takes open control and possession of the steamboats, and becomes, for the time being, the owner thereof. The transaction is not a secret, but a visible, open one. The liabillty is certain not to exceed a fixed limit. But a contract to guarantee the profits of a line of steamboats gives a railroad no control over the boats, no power of managing them "as a part of its corporate property" for its own best profit and interest, and involves the stockholders in secret and uncertain liabilities for indefinite periods of time, besides being a premium upon neglect of business, and diversion of as much trade as possible to its other routes, if any other routes are managed by it, on the part of the steamboat company.

It is therefore manifest that the argument that this contract can be supported under the power conferred by the above quoted section of the railroad act, must fail.

First. Because the language of the act does not confer any power to make a contract guaranteeing the profits of a line of steamboats, and by proper construction of such an act, whatever is not expressly included is thereby excluded.

Second. Because the careful limitation expressed in the words "as a part of their corporate property," entirely excludes any other use of steamboats by railroad companies in Wisconsin except as a part of their corporate property, and no proper construction of the statute can leave out or ignore the words, "as a part of their cor-"porate property."

Third. Because a contract to guarantee profits, as in the case at bar, is not in any way cognate or incidental to a power to build, construct and run steamboats as a part of the corporate property of a railroad, but is, on the contrary, entirely opposed as well to the spirit, meaning and purpose of such a provision as to its language.

It must also be said that at least in the circuit from which this appeal is taken, and perhaps generally, there is a marked tendency in the courts to-day to disregard altogether the doctrine of *ultra vires*. So many exceptions are made by which one contract or another is differentiated from the principle underlying this doctrine that there scarcely ever comes a case at all in which it is faithfully applied. Indeed, it is not an uncommon thing to hear lawyers find fault with authorities in which the doctrine of *ultra vires* is sustained as being antequated and rather old-fashioned. But the time has not come when this old, well-established principle of law can be dispensed with. If no restriction is to be put upon the powers of corporations except the restriction that the

state may forfeit their charters in case they go too far, many and great evils may be expected to result where state governments are not over particular as a general thing in inquiring into the private affairs of either citizens or corporations. We are not so jealously guarded even against crimes but that is found necessary that the public prosecutor shall be forced to move in the detection of criminals by some interested party, the good of the state itself not being a sufficient motive to put the wheels of justice in motion. If the courts allow the powers of corporations to run wild until they shall be pruned by the state, we are likely to see a surprising and portentious growth of these already, rather formidable members of the body politic. But it is evident that in this court at least the established principles of the doctrine of *ultra vires* are not yet forgotten, and it may be confidently expected that this doctrine will be here enforced and applied, provided the case comes clearly within the recognized principles which underlie it.

The whole doctrine has recently received elaborate consideration in the case of *Thomas* v. *Railroad Company*, 101 United States, page 71.

In that case Thomas and others had secured a lease of a railroad known as the Millville and Glassboro railroad, and under this lease they had operated this railroad for several years, paying the rent and receiving the profits from such operation. Afterwards the Millville and Glassboro railroad was consolidated, by act of legislature of New Jersey, with the West Jersey Railroad Company, subject to all the debts, liabilities and obligations of both of said companies.

One of the obligations of the Millville and Glassboro

railroad was to arbitrate and determine the value of the contract of lease made with Thomas and others in case such contract should be terminated before its expiration by lapse of time. Accordingly, upon the consolidation of the companies and the termination of the lease, an arbitration was had, and the value of the lease was adjudged by the arbitrators to be $159,437.07, and the West Jersey Railroad Chmpany was ordered to pay that sum to Thomas. They refused to do so, and the award was set aside upon the ground that the contract was *ultra vires.*

The closest parallel may be drawn between the facts in this Thomas case and those in the case at bar.

In the Thomas case the parties had gone on for years receiving and paying rent under the illegal contract; so they had done for years in the case at bar, the only difference being that in the case at bar the money was paid and the yearly settlements had under a contract of guarantee; whereas in the Thomas case the contract was a lease. In the Thomas case the counsel for the plaintiff made the objection that the contract was an executed one and had been acted under by both parties. This objection is made in the case at bar and was strongly insisted upon in the court below. In deciding this point in the Thomas case the court say, on page 86:

"In regard to corporations, the rule has been well laid "down by Comstock, C. J., in *Parish* v. *Wheeler* "(22 N. N., 494), that the executed dealings of corpora- "tions must be allowed to stand for and against both par- "ties when the plainest rules of good faith require it."

"But what is sought in the case before us is the en- "forcement of the unexecuted part of this agreement.

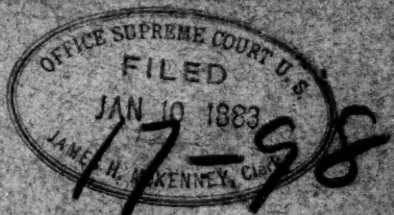
"* * * * * * * It is not a case of a contract "fully executed. The very nature of the suit is to re- "cover damages for its non-performance. As to this it "is not an executed contract." In the Thomas case the objection was made that the contract was authorized inasmuch as it was neither directly or impliedly forbidden, was germane to the object for which the company was formed, and would have been valid at the common law if made by a corporation created by charter. This objection is overruled by the court, and on page 82 the court say: "Conceding the rule applicable to all statutes, that "what is fairly implied is as much granted as what is ex- "pressed, it remains that the charter of a corporation is "the measure of its powers, and that the enumeration of "these powers implies the exclusion of all others." Now, what distinction is it possible to draw between the case of Thomas against the railroad company and the case at bar? In each case the contract was not expressly authorized or impliedly authorized by the charter. In the case at bar there is presented a contract of guarantee which it is claimed is unauthorized and void. The Supreme court of Wisconsin, in the Madison case, in the 7th of Wisconsin, above referred to, has explictly declared that a contract of guarantee is void and *ultra vires* when no power to make such a contract is given in the charter, and that decision is made in the state where this contract was made. There is, therefore, no distinction between the two cases, the Thomas case and the case at bar, with regard to the point that there was no authority in either case to make the contract which was the subject of the action.

The contract in the Thomas case was partially executed; the contract in the case at bar has been partially exe-

cuted. The holders of the contract in the Thomas case are sueing for the recovery of more money than has already been paid to them upon an unauthorized contract. The plaintiff below in this case at bar was suing for the recovery of more money upon a contract, the making of which was unauthorized and void, but upon which certain payments had been made during the course of years. The question of benefit received by the one party and of losses sustained by the other in the fulfilment of the contract, is precisely the same in both cases. It is impossible upon any other ground to distinguish the two cases, and therefor the law in the case of Thomas against the railroad company, which is the latest decision by this court of the doctrine of *ultra vires*, must be the law of the case at bar, and as we respectfully contend, it is decisive of the present case, and must defeat the right of action of the defendant below.

In conclusion, therefore, plaintiff in error maintains that this contract is wholly unauthorized and void, and cannot sustain the present action, because nothing can be found in the charter of the company to support the power to make such a contract, because the power to make such a contract is not one of the general powers incidental to the usual powers of railway companies, and because the special railroad legislation of Wisconsin does not confer the authority requisite to make such a contract valid.

WALTER CRANSTON LARNED,
Attorney for Plaintiff in Error.



17-98

SUPREME COURT.

No. 155.

THE GREEN BAY & MINNESOTA RAILWAY CO.,
Plaintiff in Error,

AGAINST

THE UNION STEAMBOAT COMPANY,
Defendant in Error.

F. J. LAMB,
Attorney for Defendant in Error.

David Atwood, Printer and Stereotyper, Madison, Wis.

SUPREME COURT.

No. 155.

THE GREEN BAY & MINNESOTA RAILWAY CO.,

Plaintiff in Error,

AGAINST

THE UNION STEAMBOAT COMPANY,

Defendant in Error.

STATEMENT.

The case was this: The Union Steamboat Company is a corporation created under the general statute of New York of 15th April, 1854, and was organized in 1869, for the general purposes of steam navigation and commerce on the great lakes, with its principal office at Buffalo, N. Y., and at the times in the complaint mentioned was the proprietor of a large fleet of steamboats navigating lakes Erie, Huron, Michigan and Superior, with agencies established and in operation at ports on those lakes and rivers connecting them. The G. B. & M. R'y Co. was a railroad corporation then organized and in operation under the laws of Wisconsin, and was proprietor of a railway extending east and west across that state from the city of Green Bay, a port on Lake Michigan, to the Mississippi river, opposite the city of Winona, state of Minnesota, two hundred and thirteen miles in length. The road was new, its line having only been put in operation in the fall of 1873. (Fol. 27, case.)

In view of the location of its railway and the purposes of its creation any successful prosecution of its business made some agreement or arrangement for water transportation or steam navigation at each end of its line of road indispensable, for

sending east from Green Bay freight and passengers shipped over its road from the west, as well as for securing for itself freight and passengers from points east of its terminus at Green Bay and destined for points west of that city, including river towns along the Mississippi and points in Iowa, Minnesota, Dakota and territory beyond.

The defendant railway had power as a common carrier to contract for carriage of passengers and freight to and from points beyond the limits of Wisconsin. This had been adjudged as matter of common law in Wisconsin as early as 1865. *Peet v. R'y Co.*, 19 Wis., 118; *Same v. Same*, 20 Wis., 594; *Candee v. R'y Co.*, 21 Wis., 582. The principle was also embodied, in 1872, by the legislature, in a general statute. Sec. 51, General Laws of Wisconsin for 1872: "Any railroad company heretofore or hereafter incorporated by or under the laws of this state, may exercise all its rights, franchises and privileges in any other state or territory of the United States, under and subject to the laws of the state or territory where it may exercise, or attempt to exercise, the same, and may accept from any other state or territory and use any additional or other powers or privileges applicable to the *carrying of persons and property* by railway *or steamboat* in said state or territory, or otherwise applicable to the doings of said company in said state or territory."

As early as 1853 the legislature had, by a general law, enacted that any railroad company in Wisconsin might make with any railway company having a terminus on the eastern shore of Lake Michigan, any such contract "as they shall deem most beneficial to their interest;" and declaring the law applicable to such railway companies the same as if made part of their charters. Section 2 of the act provided:

"Sec. 2. It shall be lawful for such companies to build, contract and run, as a part of their corporate property, *such number of steamboats or vessels* as *they may deem necessary to facilitate the business operations of such compauy* or companies." Gen. Laws Wis. 1853, ch. 76.

The provisions of this statute have remained in force ever since.

Lake Michigan constitutes the entire eastern boundary of

the state of Wisconsin. The geographical situation of the state makes the principle or power recognized in these statutes and decisions indispensable for all railroads in the state running east and west, and having, like the G. B. & M. R'y, an eastern terminus on Lake Michigan.

In addition to this, the charter of the Green Bay & Minnesota R'y Co. contains this express grant of power: Sec. 7, ch. 540, Private and Local Laws 1866 (Wis.). "The directors shall have authority and power, and they are hereby authorized and empowered to make such covenants, contracts and agreements with any person or persons, copartnership or *corporation whatsoever*, as the construction of their railroad or its *management* and the convenience and interest of the company and the *conduct of its affairs* may *in their judgment require*."

In September, 1873, the parties made the written contracts which, with their incidents, are set forth at folios 26–41 of the printed case.

An important object of these writings was plainly to secure business for this new railway company.

By this agreement the steamboat company agreed to run in connection with the railway company two large steam propellers, the Passaic and Canisteo, between the ports of Buffalo, N. Y., and Green Bay, Wis., touching at Cleveland, Detroit, Port Huron and Mackinac, during the season of navigation in each year, and until the end of the season of 1877, the season to end 30th November, at noon, in each year. It seems the two propelers named had previously made some trips between said ports. The railway company, in consideration of the covenants and agreements of the other party, agreed to and did guarantee to the steamboat company the gross earnings of each boat for each year during the time $45,000, and to pay January 1, in each year after the close of the season, the difference between the gross earnings and that sum, if such earnings were less. There were many details in regard to mutual benefits *in the procuring and shipping freights and passengers* for the G. B. & M. R'y Co., and against discriminations, and for new boats in case of loss of either named, and many other details. A clause in the contract provided for its specific ratification by vote of the directors of the railway company. The contract also provided for an

approval by the Erie R'y Co., which was indorsed 17th September, 1873.

The parties signed a further memorandum declaring the spirit and intent of the contract in some particulars, fol. 37–41; particularly at fol. 39, it was agreed that *all unconsigned freights received by the Erie R'y Co. or Union Steamboat Company destined to points reached by the Green Bay & Minnesota R'y Co., and its river and rail connections westward, should be sent to Green Bay* for the railway, and that all *passengers* ticketed by the *Erie R'y Co., or any of its connections it could influence or control* via the lakes, *were to be ticketed* via *Green Bay*, and that the G. B. & M. R'y Co. would in like manner consign to the Erie R'y Co. all its otherwise unconsigned freights and passengers; and by article ninth, it was agreed that the Mississippi river connection should be with the "Diamond Jo. Line" of steamers at Winona, and Jos. Reynolds, proprietor of that line, agreed in rates and unconsigned business, in both directions, he would favor the line via Winona, and use his influence to secure business via the G. B. & M. line and Erie R'y line; and it was also agreed that the agents of each should be agents of all in the furtherance of the business, and the contracts were executed by all the parties named. In compliance with a provision of the contract, the board of directors of the G. B. & M. R'y Co. adopted proper resolutions and duly certified the same to the steamboat company (fol. 41).

"*Resolved*, That the proposed contract between this company and the Union Steamboat Company has the approval of the board of directors of this company; and the execution of said contract by the signature of the president and secretary, and the affixing the corporate seal of this company, be and is hereby authorized as of September 1, A. D. 1873, and under the former corporate name and seal of this company.

"*Resolved*, That any deficit in earnings of the two propellers provided for in the proposed contract between this company and the Union Steamboat Company below the guarantee set forth in said contract, shall, if said contract is duly ratified by all parties to it, be regularly paid according to the conditions in said proposed contract, any consideration of leases, transfers of ownership of the road by this company or future policy to the contrary notwithstanding."

These resolutions were an official attestation in the language of sec. 7 of the railway charter, already quoted, that the contract was such a one as *in the judgment of the directors, the management* of *its railroad and the convenience and interests of the company and the conduct of its affairs required.*

All the parties at once entered into the performance and enjoyment of the contract. The provisions for securing freight and business for the G. B. & M. R'y Co. from the Steamboat Company and the Erie R'y Co. and its tributaries, and all its connections it could "influence or control," were all performed faithfully, and performance received and enjoyed by the G. B. & M. R'y Co. from week to week, and trip by trip, as it was rendered, from the time of making the contract until the contract was terminated by the full lapse of time fixed by its terms, January 1st, 1878. No objection was ever made to the contract, no attempt was made to disaffirm or deny it, nor refusal to receive its benefits by the G. B. & M. R'y Co. during the period of its existence; but on the contrary it claimed, received and enjoyed its full benefit and fulfillment, in all particulars, during the entire time. The first two years appear to have justified the contract, on the basis of anticipated business. The last three years of the time there was a deficiency in the third year, not a large amount, $7,398.30 (fol. 6); for the last two years, from depression in business without fault of parties, the deficiency amounted to a considerable sum, amounting with the $7,398.30 and interest, at the time of trial, June 12th, 1878, to $78,876.13. For $7,398.30 the G. B. & M. R'y Co. gave the Steamboat Co. its promissory notes, May 1st, 1876, in settlement of the deficiency of 1875. The complainant alleged these facts. The G. B. & M. R'y Co. made answer to the complaint, alleging a modification of the contract which would reduce the amount due thereon, and denied its power to make the contract, but sought a judgment in its favor based on the contract as valid.

It alleged *as a counter claim:* 1. That the Steamboat Company had not fulfilled this contract by making as low rates on the propellers as on other boats belonging to the Steamboat Company in the Milwaukee and Chicago trade, carrying similar freight (fol. 17). 2. In not making proper reports of the earnings of the pro-

pellers, and in not allowing the R'y Co. access to their books and accounts. 3. *In failing and neglecting to control in favor of defendant all the freight and passenger business within its control, or within the control of said Erie R'y Co.* (fol. 18); and, 4. In not running said propellers during the time agreed in the contract; and claimed that the damages it was entitled to recover would exceed the sums due plaintiff on their said agreements by the sum of $3,028.46, for which sum it demanded judgment against the Steamboat Company. The Steamboat Company replied, denying the alleged failures and neglects constituting the counter claim, and alleging the notes in suit were part of notes given on settlement for the first three years under the contract, and all such notes except those in suit had been paid.

The verdict of the jury determined the fact to be, that the Steamboat Company and Erie R'y Co. and Diamond Jo Line did control in favor of defendant all freight and passenger business within their power in accordance with the contracts; that the plaintiff had fully performed the contracts. Every issue was found in favor of the plaintiff. On this verdict judgment was duly entered.

No pretense was ever made by the G. B. & M. R'y Co. that the contract was *ultra vires* until after its full performance by the Steamboat Company, nor until it had received such full performance and enjoyed all the benefits it conferred, nor until suit was brought to enforce against it the payment of the money due on the contract. Even then the G. B. & M. R'y Co. claimed the contract valid as the foundation of its alleged counterclaim of nine thousand dollars.

A motion for a new trial on the ground that the contract was *ultra vires* was made and argued before Judge Bunn, district judge, who tried the case in September, 1878, and was by him overruled Nov. 8, 1878, with leave to renew it before Judge Drummond (he being then in Europe) at Madison at the December term, 1878 (fol. 24).

The motion was renewed, argued by respective counsel, before Judges Drummond and Bunn, and denied, and decision announced in open court during said December term for 1878, on 21st February, 1879 (fol. 25).

The December term, 1878, expired on the 31st May, 1879.

No steps were taken toward settling or procuring a bill of exceptions by appellant until the 18th July, 1879, when defendant requested a bill of exception be signed as of December term, 1878; to which plaintiff duly objected, because it was too late, and defendant had by its laches lost the right to have a bill of exceptions signed in the case. The district judge concluded to sign the bill, adding a statement of facts as found at fols. 44, 45. The laches were solely the laches of counsel of the railway. The decision was announced in open court, duly entered in the record, and they took no step to ascertain the decision until after the expiration of the term. It was then too late. *Müeller v. Ehlers*, 1 Otto, 249.

I.

The contract was not *ultra vires*. The objects to be attained by the contract were indispensable to any successful prosecution of the business of the railway company; those objects were legitimate, germane to, and clearly within the scope of its general business, and were included among the objects for the accomplishment of which the corporation was created.

Power to make contracts to attain those objects was necessarily bestowed upon it as an incident and essential part of its creation and organization.

Even if this were doubtful, the peculiar and broad provisions of the charter already quoted would seem to leave no doubt in this case. The particular kind of contract it should make for that purpose, and with whom, and when, and how, with all other details, were matters committed by the charter, as well as the law, to the judgment and discretion of the directors.

One object to be attained under the contract by the G. B. & M. R'y Co. was the securing reliable and sufficient means and facilities for performing contracts it might make for carrying freights and passengers to and from business and commercial points east of the eastern terminus of its railway at the city of Green Bay, on Lake Michigan.

Another object was to secure business for its railway not only by being able to make contracts with certain and sufficient means of performing them, for carriage of passengers and freight to it and from it for and from points beyond the limits of its own railway, *west* as well as *east*, but also, and quite as important, to secure by the contract the benefit of the aid and assistance of the Union Steamboat Company and of the Erie Railway Company in procuring for it freight and passenger business for its road. These corporations were both old, well established and powerful, and by means of numerous well organized agencies able to control and secure to the G. B. & M. R'y a large and lucrative share of the carrying business of the west. These objects, among others, were secured by the contract.

The importance of these objects to the Green Bay & Minnesota Railway Company is indicated by its geographical position. It extended across the state of Wisconsin from the Mississippi river to Lake Michigan, an east and west road,— at the date of the contract and ever since the most northern road running in the same direction in that state. Its eastern terminus was at the head of Green Bay, a port of Lake Michigan. This bay is about one hundred miles long from its northern junction with the lake. The head of the bay about one hundred miles north of Milwaukee and about two hundred miles north of Chicago.

No contract could be made with lines of steamers already in operation between Buffalo and Chicago and Milwaukee, for the reason that any steamer, in order to reach the port of Green Bay on such a trip, would, of necessity, have to put in, loaded or partially, and travel in that condition, as much as three hundred miles extra each trip up or down the lakes. The deflection of such boat from the usual track between Buffalo and Milwaukee or Chicago, would be at least one hundred and fifty miles in getting to Green Bay, and as much in getting back to such usual track of boats making the trip between Chicago or Milwaukee and Buffalo. This was impracticable with boats running between Milwaukee or Chicago and Buffalo. The conclusion that the directors could not make any such contract with lines already established and in operation, is justified by these facts and the other fact that they did not. It is evident

that the business of the railway company could not be prosecuted with success or with any hope of success, without a contract securing the objects secured by this contract already mentioned. If such a question is a question of fact in this case, it has been settled in favor of the Steamboat Company by the verdict of the jury.

That these objects were legitimate results from the common law and statutory right which authorized the R'y Co. to make and carry out, or cause to be carried out, contracts for carriage of persons and property from and to points beyond the *termini* of its railway. Modern decisions in all courts of this country and England are in substantial accord that this right is incident to all railway corporations, and they have the power to make contracts for such purposes, and such contracts are not *ultra vires.*

R'y Co. v. Pratt, 22 Wall. 123, and cases cited from New York, Mass. and Vt.
Peet v. R'y Co. 19 Wis. 118.
Candee v. R'y Co. 21 Wis. 582.
Ch. 119, sec. 51, Gen. L. Wis. 1872.
R'y Co. v. McCarthy, 96 Otto, 296.

It is held further, that when, as in this case, a railway has a terminus at a port like Green Bay, where further transportation is necessarily carried on by boats over large bodies of water like the great lakes in this case, the railway company has the full right at common law to run a steamboat line in connection with its railway business. This was decided in England in ———, in *South Wales R'y Co. v. Redmond*, 10 C. B. N. S. 675, where one terminus of the railway was the port of Milford Haven, and the railway had hired steamboats to run in connection with its railway. It was sued for loss by an unseaworthy boat. It set up that its contracts for steamboats and running them were *ultra vires.* Erle, C. J., said: "So far from a contract by this company to *facilitate the forwarding of passengers and goods to Ireland* (by steamboats) being illegal, I rather gather that the legislature contemplated and intended that a railway terminating at Milford Haven should forward traffic to and from Ireland, and,

therefore, this contract would be *entirely within the scope and object* of the company's incorporation."

See also

Shawmut Bk. v. R'y Co. 31 Vt. 491.
In re British & Foreign Cork Co., Læifchild's case, L. R., 1 Eq., 231.
Bissell v. R'y Co., 22 N. Y., 264, 269.
Field on Corporations, pp. 304, 5, 6.

This court say in *R'y Co. v. McCarthy*, 96 U. S., 258: "When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."

Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal., 620.
Whitney Arms Co. v. Burton et al., 63 N. Y., 62.

The decisions hold further with great unanimity, that where a power exists in such corporation, either express or implied, the method of exercising it, or the making contracts in regard to the exercise of such power, is committed almost entirely to the discretion of the directors of the corporation.

In *N. W. Union P. Co. v. Shaw*, 37 Wis., 655, a case much relied on by counsel for the railway company, where a naked contract for the purchase of grain by a common carrier was held *ultra vires*, the court nevertheless held that possibly such corporation might lawfully purchase grain for storage and shipment, for the purpose of keeping its warehouses and boats employed when they would otherwise be unemployed.

In the case most relied on by opposing counsel, *Madison, Watertown and Milwaukee Plank R. Co. v. Watertown and Portland Pl. R. Co.* 7 Wis. 53 [58] Whiton, C. J., on demurrer to the bill, in holding with evident reluctance that the contract was *ultra vires*, says on this point: "It is to be remembered that the bill *does not allege* that the route which the Watertown and Portland Plank Road Company was to con-

struct *extended to Madison*, or *that the road was in any way intended to connect the last mentioned town with Watertown or Milwaukee.*" The just inference from this language is that such fact, if an element in the case, would have had an important effect on the decision, even leading to an opposite result.

The cases hold that the means adopted need not be such only as are indispensable; they may be such as are convenient or conducive to accomplish such purposes and objects.

In 1860, the matter became before the supreme court of Wisconsin in *Clark v. Farrington*, 11 Wis. [306]. In determining what means not specially conferred by its charter a corporation might lawfully adopt to accomplish the purposes or objects of its creation, the court adopted the reasoning and conclusions of Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. 316; 4 Curtis, 415, as follows, p. [322]: "The constitution of the United States gave congress the power to pass all laws '*necessary and proper*' for carrying into execution the powers conferred upon the federal government. That government chartered a bank, and its constitutionality being called in question, the supreme court of the United States placed a construction upon these words. They held that the word '*necessary*' did not imply that the means used must be absolutely indispensable, but that the government might select any which were '*needful*,' '*requisite*,' '*essential*' or '*conducive to*' the end, and tended directly to its accomplishment, and therefore might charter a bank. Whether or not it justifies that conclusion, there is undoubtedly great force in the reasoning of Chief Justice MARSHALL as to the necessity of the power on the part of the government to select *convenient* means for the execution of its powers;" and the court approved the reasoning as applied to ordinary private corporations (a R'y Co. in that instance) to sustain their right to "an equal freedom in selecting among various means proper for the execution of its powers;" and the court held that "a corporation is not restricted to the means either '*usual*' or '*necessary*,' but might select those *convenient and adapted to the end*, though '*unusual*' and not absolutely necessary."

II.

We deem the clause in sec. 7 of the charter of the R'y Co., ch. 540, P. & L. Laws Wis. 1866, important in this case.

"The directors shall have authority and power, and they are hereby authorized and empowered to make such covenants, contracts and agreements with any person or persons, copartnership or corporation whatsoever, as the construction of their railroad or its management and the convenience and interest of the company and the conduct of its affairs may in their judgment require." The plain, ordinary meaning of the language of this provision is, that if, *in the judgment of the directors*, the *management* of the railway, or the *convenience* of the company, or the *interests* of the company, or the *conduct of its affairs*, made the contract desirable, then the charter conferred the power. Of course the judgment of the directors must have been exercised in good faith. There is no controversy here that this was not done. Similar language in charters has been construed by the courts, and, as far as we have observed, they have sustained the views we contend for here. In 1868, such a question arose in Wisconsin, in *The Uncas B'k* v. *Rith*, 23 Wis., 339. The question was on the power of the Milwaukee & Superior R'y Co. to deal in certain securities. The court say: "The company was incorporated with power and authority to locate, construct and maintain a railroad within certain limits. Ch. 79, Priv. Laws of 1856. By the fourteenth section of the charter, the directors were authorized, among other things, 'to make such covenants, contracts and agreements with any person or persons, copartnership or corporation whatever, as the execution and management of the work and business, and the convenience and interest of said company may require.' If any doubt could possibly exist, whether the company, under the general power granted to build and maintain its road, would be authorized, for the purpose of raising means to accomplish the end of its creation, to sell or pledge a note and mortgage belonging to it, to secure one of its bonds, that doubt must be removed by *the comprehensive language just quoted*. The directors are authorized to make such contracts and agreements with any person as the execution and manage-

ment of the work and business and the convenience and interest of the company may require."

In the case at bar the language is more comprehensive. The power to make a contract is not made to depend on the question whether such contract is *required* in fact, but whether it is required in the *judgment* of the directors.

In 1869, such a clause came before the Lord Justices in England in chancery. The case is reported in 17 Weekly Reporter, pp. 456 to 459: *In re Peruvian R'y Co. v. International Contraei Co.* It was an appeal by the International Contract Co. from decision of Vice-chancellor Malins, fixing them on the list of the Peruvian Co. for over 5,000 shares of its stock on winding up that company. The question turned entirely on whether it was *ultra vires* for the International Co. to become shareholders in another company. The 92d clause of the articles of association was this: "The directors shall have full power, in the name and on behalf of the company, to make and enter into all such contracts for carrying out the objects of the company mentioned in the memorandum of association as they, in their absolute discretion, think fit."

The head note is, "The memorandum and articles of association authorized them *inter alia* to purchase and conduct the business of any railway or other undertaking, to transact the business of a capitalist or contractor, and do all other things whatsoever which the company might from time to time *think conducive* to the attainment of any of the objects previously mentioned or likely to be in any other way advantageous to the company. *Held*, that the company were authorized to become shareholders in another company which was established for the formation of a company for the construction of railways in a foreign country."

The court, Lord Justice Selwyn, on this point says: "But for the elaborate argument we have heard, I should not have thought that this was an arguable case. I cannot at all accede to the argument of Mr. Higgins, that there is any such rule of this court as he has alluded to, as to the necessity of the court taking on itself to construe memoranda and articles of association in the strictest possible manner, or in any other manner than in that in which the court construes documents of an or-

dinary kind. I think the ordinary rules of construction apply to memoranda and articles of association just as much as to any other kind of document. . . We are therefore remitted at once to the memorandum of association, and it becomes unnecessary to consider any of the other clauses of the articles of association than the 92d (already quoted).

Whether, therefore, this transaction which is said to be *ultra vires* is considered as a dealing with the concession which had been acquired by the company in a manner which the *directors considered conducive to the interests of the company*, or whether it is considered as an undertaking to form a new company, or as a purchase of a business, or as the purchase of a railway, or as a general transaction of the business of a capitalist or contractor, the doing of which the *company considered conducive to its interest*, with reference to all or any of those cases they are clearly within the powers given by the memorandum of association. I think, therefore, the appeal must be refused with costs."

III.

It does not follow that a contract is not to be enforced because *ultra vires* and on principle it ought not. "Corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot by their acts, representations or *silence* involve others in onerous engagements, and then turn around and disavow their acts and defeat the just expectations which their own conduct has superinduced." This was a case of guaranty by a railway company of municipal bonds.

R'y Co. v. Howard, 7 Wall. 413.

In *Whitney Arms Co. v. Burton*, 63 N. Y., 62, the court held the contract there in question clearly *ultra vires*. It was a contract for service and manufacture, and had been fully performed by plaintiff, and performance received by defendant. The court declare that if a stockholder or party interested had

sought to prevent performance of the contract, any competent court must have enjoined its performance. As stating our claim here we beg to quote: "The manufacture of the locks, or contract to sell them to the Seal Lock Company, were not acts immoral in themselves or forbidden by any statute; neither *mala in sesse* nor *mala prohibita*, so as to make the contracts illegal and incapable of being the foundation of an action. * * When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as a corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out these objects for which the corporation was created. * * Here as between two corporations, the debtor and creditor corporations, the contract has been fully performed by the creditor, the plaintiff in this action, and the Seal Lock Manufacturing Co. has received the full consideration of its promise to pay. The plaintiff has parted with its property to the latter corporation, and unless a legal liability exists on the part of the latter to pay, the plaintiff can neither reclaim the property or recover compensation, and under this technical plea a great wrong will be perpetrated. A purchaser who acquires by contract, and under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either for services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires* or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail in an action by the corporation.

"It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when *the contract has been in good faith fully performed by the other party and the corporation has had the full benefit of the performance and of the contract.* The same rule holds *e converso.*" The doctrine is sustained by a

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great number of authorities referred to in the opinion, and has the explicit approval of this court in *R'y Co. v. McCarthy*, 96 U. S. 267.

The doctrine is stated by Sedgwick (Stat. & Const. Law, 73): thus, "Although a corporation *in making a contract* acts *in disagreement* with its charter; where it is a simple question of authority to contract, arising either on a question of regularity of organization or of *power conferred by the charter*, a party who has had *the benefit of the agreement* cannot be permitted, in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains." In *Pine Grove v. Talcott*, 19 Wall. 666, and in *National Bank v. Matthews*, 98 U. S. 621, this doctrine as stated by Sedgwick is quoted by this court and expressly approved, together with the authorities quoted by Sedgwick to sustain it.

See also

Gold Mining Co. v. Nat. Bk. 96 U. S. 640.
Railroad Co. v. Howard, 7 Wall. 392.
Smith v. Shelly, 12 Wall. 358.
Railway Co. v. McCarthy, 96 U. S. 258, 267.
Whitney v. Wyman, 101 U. S. 392.
Thomas v. R'y Co. 101 U. S. 86.
Jones v. Guaranty, etc. Co. 101 U. S. 622, 628.
Bank v. Whitney, 103 U. S. 99.

The doctrine has been recognized and sustained by a great number of decisions by the highest courts in a large majority of the states.

The cases in which this doctrine is applied and upheld are not at all limited to cases involving only the unjust witholding of *money* or *property*, as such. On the contrary all cases are embraced in which the *consideration* of the contract on one side has been furnished or performed by one party and either accepted, received, or the *benefit or advantage bargained for* had or enjoyed by the other. No matter what it may have been — money, property, service, labor, or anything else — in short, whatever might in law constitute consideration.

In language of the proposition repeatedly approved by this

court, "A party who has had *the benefit of the agreement* cannot be permitted (as against the other party who has performed the agreement), in an action founded upon it, to question its validity."

This is well illustrated in a late case in Pennsylvania. *Oil Creek & Alleghany R'y Co. v. Penn. Transportation Co.*, 83 Penn., 160. Action was brought against the Oil Creek R'y Co. by the Transportation Co. Plaintiff was an oil pipe line. The R'y Co. made a contract with the pipe line to pay the pipe line a certain sum per barrel on all oil transported by the railway company in *consideration* that the pipe line would deliver all the oil *under its control* to the R'y Co. for transportation. The pipe line performed its part of the agreement and brought suit to recover the price agreed on. The supreme court of Pennsylvania held that the R'y Co. could not set up as a defense that the contract was *ultra vires*. On that question the court say: "We do not think the defendants are in a position to defend upon the illegality of the contract.

"*There were mutual covenants and mutual advantages.*

"The defendants have enjoyed the advantages, *such as they were*. To the extent of the demand in suit the contract was executed, and to say now that it is *ultra vires* comes with a bad grace from the defendants," and the defense of *ultra vires* was overruled.

A late case in Indiana illustrates the rule. *The State Board of Agriculture v. The Citizens' R'y Co.*, 47 Ind., 407, 413.

The defendant, a Street Railway Company, entered into an agreement to pay the Board of Agriculture $1,000, if the board would locate their fair for three years at a point — a terminus of defendant's railway. The board performed the agreement on its part, and sued for the money, and the defendant then, as in the case at bar, set up the defense that the contract was *ultra vires*. The defense was overruled. The court say, p. 413: "It is fully shown on the part of the plaintiff that the State Board of Agriculture performed the contract on its part. The Street Railway Company has thus received the benefits and *advaniages of the contract*, but seeks to avoid paying the consideration promised because it had not the power to contract for the benefits which it has actually received. In our opinion the

Street Railway is not at liberty to assume this position. It has received the profits resulting from a compliance of the plaintiff with the contract. These profits, we are at liberty to presume, have gone to swell the dividends of the stockholders in that corporation;" and the court held it would be unjust to allow the Railway Company to repudiate its contract.

In *Hays v. Gallion G. Co.* 28 Ohio St. 330, 340, the court say: "The rule seems well established that where a contract has been executed and *fully performed on the part of either the corporation or of the other contracting party*, neither will be permitted to insist that the contract and such performance by one party were not within the corporate power of the company."

The supreme court of Iowa adopt the rule that "the doctrine of *ultra vires* will be applied to such contracts *only* as remain *wholly* executory."

Thompson v. Lambert, 44 Iowa, 239.

Even in a case relied on by opposite counsel, *Downing* v. *Mt. WashingtonR'y Co.*, 40 N. H., 230, the court enforce this doctrine, and in doing so divide what might otherwise be considered an entire contract. The corporation by one order bargained for seven or eight omnibuses and *one light wagon*. The light wagon was delivered by the maker, received by the R'y Co., and used by it. While allowing the R'y Co. to repudiate the order so far as the omnibuses or stages were concerned, the supreme court of New Hampshire held the company liable for the light wagon, substantially applying the doctrine as laid down by Sedgwick.

Without discussing other cases particularly, we refer to a number of decisions of the highest courts of a number of states, which sustain the principle announced by Sedgwick and repeatedly approved by this court. We invite for these careful consideration.

De Graff v. Am. Linen Co., 21 New York, 127.
Parish v. Wheeler, 22 N. Y., 494.
Bissell v. R'y Cos., 22 N. Y., 264, 269.
Palmer v. Lawrence, 3 Sandf., S. C., 162.
Steam Nav. Co. v. Weed, 17 Barb., 378.

Silver Lake Bk. v. North, 4 John. Ch., N. Y., 370.
Mott v. U. S. Trust Co., 19 Barb., 568.
Pratt v. Short, 79 N. Y., 437.
Whitney Arms Co. v. Burton, 63 N. Y., 62.

Abbott v. Herman, 7 Greenlf., MAINE, 118.
Perkin v. R'y Co., 47 Me., 573.

Hatch v. Purcell, 1 Fost., NEW HAMPSHIRE, 544.
Hall v. Mut. Ins. Co., 32 N. H., 297.

Pratt v. Swanton, 15 VERMONT, 147.
Chaplin v. Hill, 24 Vt., 528.
Rutland R'y v. Boston R'y, 29 Vt., 93.

Chester Glass Co. v. Dewey, 16 MASSACHUSETTS, 94.
Tash v. Adams, 10 Cush., 252.
Fuller v. Melrose, 1 Allen, 166.
Parker v. R'y Co., 3 Cush., 107, 108.
McCluer v. R'y Co., 13 Gray, 124.

Bulkley v. Derby Co., 2 CONNECTICUT, 253.
Terry v. Lock Co., 47 Conn., 141.

Morris R'y Co. v. R'y Co., 20 NEW JERSEY Eq., 542.

Steamboat Co. v. McCutcheon, 13 PENNSYLVANIA St., 13.
Alleghany v. McClusken, 14 Penn. St., 81.
Grant v. Henry Clay Coal Co., 80 Penn. St., 208.
Oil Creek R'y Co. v. Penn. Tr. Co., 83 Penn. St., 160.

Grape Sugar Co. v. Small, 40 MARYLAND, 395.

Oldham v. Bank, 85 NORTH CAROLINA, 240, 243.

Bank v. Hammond, 1 Rich. SOUTH CAROLINA, 281.

Macon R'y v. Georgia R'y, 63 GEORGIA, 103.
Hazelhurst v. R'y Co., 43 Ga., 13.

Cannon v. McNab, 48 ALABAMA, 99.

Com. B'k v. Nolan, 7 How., MISSISSIPPI. 508.
Grand Gulf B'k v. Archer, 8 S. & M., 151, 173.
Wade v. Am. Col. So., 7 S. & M., 663.
Littleworth, Supt., v. Davis, 50 Miss., 403.

Southern R'y Co. v. Lanier, 5 FLORIDA, 110.

Whitman Min. Co. v. Baker, 3 NEVADA, 386.

Union Water Co. v. Murphy Flat Co., 22 CALIFORNIA, 620.

Miner's Ditch Co. v. Zellerbach, 37 Cal., 543.

Kelly v. People's Transp. Co., 3 OREGON, 189.

Whitney v. Pey, 24 ARKANSAS, 26.
Helena v. Tuner, 36 Ark., 577.

Pike v. Columbia Ins. Co., 10 Mo. App. MISSOURI, 150, 166.
St. Louis Drug Co. v. Robinson, 10 Mo. App., 588.

Thompson v. Lambert, 44 IOWA, 239.
Iowa Lumber Co. v. Foster, 49 Iowa, 25.

Auerbach v. La Seur Mill, 28 MINNESOTA, 291, 297.

Germantown Ins. Co. v. Dheim, 43 WISCONSIN, 420.
Farmers & Millers' Bk. v. Det. etc., R'y, 17 Wis., 372.

Bradley v. Ballard, 55 ILLINOIS, 413.
Chicago B. S. v. Crowell, 65 Ill., 453.
City E. St. Louis v. E. St. C. G. L. & Co. Co. 98 Ill., 415.
Darst v. Gale, 83 Ill., 140.
West v. Madison Co. Agr. So., 82 Ill., 205.
Peoria R'y Co. v. Thompson, 103 Ill., 187.

State Bd. v. Citizens' R'y, 47 INDIANA, 407.
Poock v. La Fayette Co. Bk., 71 Ind., 357.

Chapman v. R'y Co., 6 OHIO St., 137.
Hays v. Gallion G. Co., 29 Ohio St., 330, 340.

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